TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1918

No. 304

[redacted]

PLAINTIFF IN ERROR,

vs.

[redacted]

IN ERROR TO THE [redacted]

31076

(18,545.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 336.

MEXICAN CENTRAL RAILWAY COMPANY (LIMITED), PLAINTIFF IN ERROR,

vs.

J. M. DUTHIE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

INDEX.

	Original	Print.
Caption	1	1
Plaintiff's original petition	1	1
Original citation	20	13
Marshal's return	23	15
Exception to citation	23	15
Order sustaining exception to citation	27	17
Waiver of service	27	18
Defendant's original answer	28	18
Plaintiff's first amended original petition	29	19
Verdict	41	26
Judgment	41	27
Order extending time to file bills of exceptions	42	28
Motion of plaintiff for leave to amend pleadings	43	28
Order permitting amendment of pleadings	44	29
Defendant's first, second, and third bills of exceptions	45	30
First amended original petition	45	30
Original petition as to all jurisdictional averments	57	37
Original answer	58	38
Order overruling demurrer	59	38
Verdict	59	39
Judgment	60	39

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	Original.	Print
Motion for leave to amend petition	61	40
Order granting leave to amend, &c.	62	40
Judge's certificate to bills of exceptions	64	41
Order of court as to certificate of jurisdiction	64	42
Certificate of jurisdictional questions	65	42
First amended original petition	65	43
Original petition as to all jurisdictional averments	77	50
Original answer	78	51
Order overruling demurrer	79	51
Verdict	79	51
Judgment	80	52
Motion for leave to amend petition	81	52
Order granting leave to amend, &c.	82	53
Questions certified	84	54
Defendant's assignment of errors	85	55
Defendant's petition for writ of error	86	56
Original writ of error	88	56
Original citation and service	89	57
Clerk's certificate	90	58

1 *Caption.*

Be it remembered, that there was opened and begun to be holden a regular term of the United States circuit court for the western district of Texas, at El Paso, Texas, on the 7th day of April, A. D. 1902, it being the first Monday in said month and the day fixed by law for commencing a regular term of said court at said place.

Present: The Honorable T. S. Maxey, United States district judge; Honorable Henry Terrell, United States district attorney; George L. Siebrecht, United States marshal for said district, and D. H. Hart, clerk of said court; when and where the following proceedings, among others, were had, to wit:

J. M. DUTHIE
vs.
MEXICAN CENTRAL RAILWAY COMPANY, LIMITED. } No. 297.

Plaintiff's Original Petition.

Filed August 29, 1901.

THE UNITED STATES OF AMERICA:

To the hon. circuit court for the western district of the State of Texas, at its October term, 1901, held at El Paso, Texas:

THE STATE OF TEXAS,
County of El Paso,
Western District of the State of Texas.

To the Hon. T. S. Maxey, judge of said court:

2 Your petitioner, J. M. Duthie, who is hereinafter styled plaintiff, complaining of The Mexican Central Railway Company, Limited, and which company is hereinafter styled defendant, respectfully represents:

That plaintiff resides in El Paso, in El Paso county, State of Texas, in the western district of said State, and is a citizen of said State and of the United States of America. That defendant is a railway or railroad corporation, duly incorporated and chartered under the laws of and is a citizen of the State of Massachusetts in said United States of America, and owns and operates a line of railroad from El Paso to the city of Mexico in the Republic of Mexico, and is now, was on the 22nd day of July, 1901, and for many years prior thereto engaged in and pursuing the business of hauling and carrying by rail, for hire, passengers and freight over its said line to and fro between the cities above named.

That defendant has and maintains in the city of El Paso an office or offices for the transaction of its general business as common carriers of passengers and freight and has and employs there its local agent, whose name is S. R. Comfort.

That plaintiff is a married man of family consisting of himself, his wife Francis A. Duthie and their minor son.

That on the 22nd day of July, 1901, at El Paso, Texas, at a cost of about eleven dollars, plaintiff purchased of defendant through its agents, representatives or clerks, transportation for himself, his wife and their child from El Paso to the city of Chihuahua in the Republic of Mexico, and on said date boarded and took passage, with his wife and child, at El Paso upon one of defendant's passenger trains for Chihuahua in said Republic and which said train was then in charge and control and under the management of defendant and its employés and servants. That on said July 22nd, 1901, at a station or place on defendant's line of railroad, in the said Republic of Mexico, called Ojo Caliente, plaintiff and his wife were,

3 through the negligence, want of ordinary care and diligence on the part of defendant and its servants and employés in charge of and managing said passenger train, greatly and seriously personally injured.

Plaintiff says that when said train arrived at said place or station, for some reason unknown to plaintiff, the train of passenger cars upon which he, his wife and child were passengers, and which train consisted of several coaches, plaintiff is unable to say how many, or cars in which passengers usually travel and such other cars, locomotive, etc., as usually compose and make up a passenger train, was at said Ojo Caliente disconnected, that is to say, one of the coaches or cars was disconnected or taken out of said train temporarily, but for what purpose plaintiff does not know, however, said car or coach was for a short while left standing alone upon the track wholly disconnected from the balance of the train, shortly thereafter the remainder of said train, which had been pulled off some distance from said coach or car, was backed down to where said coach or car was left standing for the apparent purpose of coupling on to said coach or car, at any event that part of the train to which the locomotive was attached backed down to and against said car, but instead of coupling onto said car ran against and pushed said car backward and started the same off down the track, which was down grade. Plaintiff says that if it was the object of defendant's servants and employés to run down to and couple that part of the train to which the locomotive was attached to said car that the same was negligently, carelessly and without the exercise of reasonable and ordinary care done, for the reason that said part of the train to which the locomotive was attached was backed down at so great a rate of speed that when that part of the train came in contact with the standing car the force of contact and jar was so great that the coupling failed to catch and hold or having caught was again jarred loose and disconnected.

4 Plaintiff says that said car when run against and started off down the track continued to run on down said track and as it proceeded its speed increased to a rate of twenty-five to thirty miles an hour and said car ran off down the track for a distance of about six miles, that after said car had proceeded some distance down the track, say a half a mile, that part of the train to which

the locomotive was attached was by the employés, agents and servants of defendant started down the track in pursuit of said car and for the apparent purpose of catching same and finally did catch and run and crash into said car.

That when said part of the train was backed down to said car for the apparent purpose of coupling thereto, plaintiff was on the coach or car in front of said part of said train, the same going backward at the time, and his wife and child were on said car left standing, and plaintiff was still on said front car or part of that part of the train to which the locomotive was attached when said part of said train was run and crashed into said car upon which plaintiff's wife and child still were.

That when said part of said train to which the locomotive was attached started out to catch said car, which had theretofore been started off by itself, and was apparently at the time said part of the train to which the locomotive was attached started in pursuit running wild, and appeared to be beyond control, said part of said train was started in pursuit at a high rate of speed which was increased as said part of said train continued the pursuit of said wild car; that finally said part of said train caught up with said car.

That plaintiff was then near the door or on the platform of the front car, that is to say, the car of the pursuing cars, which was in front backing down upon said wild car; that when said pursuing cars or train caught up with said wild car the pursuing train dashed and crashed into said wild car with tremendous force and with force sufficient to wreck and demolish the ends of the cars coming in contact; that by reason of the force with which said cars came together and crashed into each other and the shock and sudden jar thereby caused, plaintiff was thrown or fell in between said cars and was greatly and seriously damaged and injured; that plaintiff's wife, who was in said wild car, was by said force and shock thrown out of the seat in which she was sitting, over the seat in front and greatly and seriously bruised and injured.

Plaintiff says that he was caught between the cars and pinioned there; that in extricating himself, which he finally with great pain and suffering did, his shoes were pulled from his feet and left sticking between said cars where he had been pinioned and held by his legs and feet, that his legs and feet were caught and held in between said cars and badly and seriously mashed, bruised and injured; that he was also wounded, bruised and mashed in his arms, shoulders, back, head and spine, in fact was bruised, beat and mashed all over his body so that he suffered and continued for many days thereafter to suffer most excruciating pain and soreness; that as a consequence of his injuries he, for more than a week thereafter, suffered great bodily pain and was unable on account thereof to sleep and rest; that he was for about twenty-five days, on account of his said injuries, confined to his bed, that for more than a week he was unable to turn his body or move in bed without great inconvenience, annoyance, pain and physical suffering; that for more than thirty-five days after

the accident he was unable to sustain any weight or to stand erect upon either of his feet; that he is still unable to bear his weight upon his right foot and is now compelled to use crutches to go about on foot; that his right foot and leg still continues and will for many months continue to be in a crippled, sore and painful condition, and plaintiff, if he is ever able, will not for many months be able to use his right leg and foot except with the aid of crutches; that said right leg is now in a crooked and deformed condition,
6 that the same was caused by the injuries received at the time of and in said accident, and plaintiff believes that said injuries to his right leg are and will remain permanent and that he will not ever again be able to use said right leg, nor can the same ever be restored to the same strength and usefulness as before it was injured as aforesaid. That for several days after plaintiff received the injuries and bruises aforesaid, he suffered great physical pain and as a result of said injuries and the shock to his mind and general nervous system from said collision and accident was very sick and came near losing his life and was in much fear that he would die as a result of his said injuries and was thereby caused to suffer and did suffer in addition to the physical pain and torture, great mental pain, fear and anguish; that ever since said injuries plaintiff has continuously suffered more or less physical pain in his legs, arms and shoulders, and especially has he continued to suffer much pain in his right leg and ankle, which is still in a disabled, crippled and deformed condition and permanently injured.

Plaintiff says that on account of his said injuries he has been compelled to lose much time, having already lost thirty days, and that he will be compelled to lose at least six months more, during which time he has been unable and will still be unable to work or follow his usual occupation and business; that his time is reasonably worth to him ten dollars per day; that in time already lost and the time he will lose, on account of his said injuries, he has been damaged in the sum of twenty-one hundred dollars.

That on account of the serious personal bodily injuries done to him, as aforesaid, the physical pain and suffering which he has endured and undergone in consequence thereof and on account of the mental pain and anguish endured and suffered as a result of said injuries he has been damaged in the sum of ten thousand dollars.

7 Plaintiff further sues herein for injuries done to his wife, Francis A. Duthie, at the same time and place and says that at the time said cars crashed together his wife was in the car hereinbefore designated as the car left standing and the wild car; that she was thrown out of the seat where she was sitting and pitched head foremost out of said seat over the back of another seat and onto the floor of the car, falling on and striking the floor with her head so that she was stunned and rendered unconscious and for a considerable time thereafter remained unconscious, and had to be assisted out of said car. That for several days thereafter she suffered severe pain and soreness in her head and neck and shoulders and was for several days confined to her bed as a result of said injuries. Plain-

tiff says that his wife has been permanently injured as a consequence of being violently thrown upon her head against the floor of the car, in this, that before said accident she was at times subject to fainting spells or epilepsy, but that since her said injuries said fainting spells or epileptic fits are of much more frequent occurrence than formerly and her suffering therefrom correspondingly increased, and that the frequent recurrence of such fainting spells or epileptic fits is the result of her said injuries and her being thrown upon her head upon the floor of said car.

That as a result of said injuries and the physical pain as well as mental suffering, pain and anguish suffered by her, and on account of the permanent injury to her health by causing the more frequent recurrence of said fainting spells or epileptic fits plaintiff is entitled to recover of defendant for the benefit of the community estate of himself and wife damages in the sum of five thousand dollars as actual damages for the physical pain and mental suffering and anguish suffered by her and for the permanent injury done to her health as aforesaid.

Plaintiff further says that each and all of the wrongs and
8 injuries done to him as well as his wife were caused through the negligence and want of ordinary care and diligence upon the part of defendant and its servants and employés in this:

First. When said car or coach was left standing upon the track defendant and its servants and employés, when the remainder of the train was backed down to be coupled onto said car, negligently and carelessly and without the exercise of ordinary care backed said train down at a much greater rate of speed than was necessary and proper to make the coupling and came against said car with such force that if the couplings were so arranged or prepared as to ordinarily effect a coupling then the couplings were by the force and jar with which said train was backed against said car thrown loose and said car started on down the track.

Second. Plaintiff says that before said train backed down to said car for the purpose of coupling thereto defendant and its servants and employés in charge of said train negligently, carelessly and without the use of ordinary care and diligence failed to properly prepare and adjust the couplings to said cars so that when they came together the couplings would catch and hold, that if said couplings had been properly set, prepared and adjusted then said cars would have coupled together and the accident averted.

Third. That defendant and its servants and employés when said car was left standing upon the track negligently, carelessly and without the exercise of ordinary care and diligence failed to provide and have said car equipped with proper and necessary appliances to prevent said car from moving and to set and leave set the brakes or apparatus for preventing said car from moving, that if said car had been properly provided and equipped with and said brakes or apparatus had been properly set and such apparatus properly attended to, then, although when the other part of the train backed down and against said car and failed to effect a coupling,
9 nevertheless said car could not have run off in the way it did, but would have moved only a short distance and stopped.

Fourth. That at the time said car started off down the track the servants and employés that were on said car, and plaintiff says there were servants and employés of defendant aboard of said car, through ignorance, unskillfulness, fright or some other unjustifiable cause were unable to control said car and to stop the same, and failed, for the reason either that they did not know how or the appliances for stopping said car were out of order to stop said car, wherefore defendant is guilty of negligence and want of ordinary care and diligence in the selection of its servants and employés placed in charge of said car or who were upon the same when it ran off. And if in fact said servants and employés were skillful and no want of ordinary care or negligence can be imputed to defendant in *their* selection and employment, then defendant was nevertheless guilty of negligence and want of ordinary care and prudence in that the appliances with which said car was equipped and provided for stopping and holding same were inferior, insufficient and unsafe or in such defective condition as not to be available for the use for which they were intended, and that they were inferior, insufficient and unsafe and in such defective condition was known or by the use of ordinary care and diligence could have been known to defendant.

Fifth. Plaintiff says that when that part of the train backed down to couple to said car and failed to make such coupling that the servants and employés of defendant, instead of then following said car with said part of said train and coupling onto and stopping said car, negligently and carelessly and without exercising the ordinary care and diligence that the occasion demanded permitted said car to run off and get from a half to a mile away before starting after it, when, if when the first attempt and failure to couple thereto was made said part of the train with the locomotive attached had followed up said car the same by the use of proper ordinary care and diligence could have been coupled onto and stopped or at least gotten under control in some way and the accident that resulted in the serious and great injuries done to plaintiff and his wife, as aforesaid, been averted and avoided.

Sixth. That when said car was about a half mile off and going at an increasing rate of speed of — miles an hour defendant's servants and employés in charge of and operating the other part of the train started out to catch said car, or judging from the result of the race, to run said car down, and said servants and employés negligently and carelessly and without exercising ordinary care and diligence failed to watch and observe the speed of the runaway or wild car and so regulate the speed of the chasing train as to approach said wild car gradually and without doing damage thereto or to the passengers upon said car and upon said chasing train, but negligently and carelessly rushed down upon said car at a great rate of speed and consequently crashed into same as hereinbefore set out, and thereby caused the injuries hereinbefore alleged.

Seventh. That defendant was guilty of culpable negligence and want of ordinary care in selecting and employing its servants and employés in charge of said train of cars; that said servants and employés were inefficient, incompetent and unskilled in the manage-

ment and handling of trains of cars and in this instance acted in a most inefficient, incompetent and unskilled manner, and the accident which resulted in the injuries herein complained of was the result of the inefficiency, incompetency and unskillfulness of said servants and employés handling and operating said passenger train and cars; that such inefficiency and unskillfulness of said servants and employés is shown in the fact that said car was left on the track without having the brakes so set as to prevent its running away, in the inability to stop said car after after it had been started, in the failure
11 to have the couplings so prepared and adjusted as to effect a coupling when the first attempt to couple thereto was made, in the failure to at once follow up said car and couple thereto when they failed to couple the first time, and in running the other part of the train down upon said car without so regulating the speed of the chasing part of the train as to approach said car and catch the same without crashing into it, and in divers other ways as shown by the allegations of negligence hereinbefore set out was the inefficiency, incompetency, and unskillfulness of said servants and employés shown and that they were inefficient, incompetent and unskillful was well known to defendant or by the exercise of reasonable care and diligence could have been known to defendant.

Plaintiff says that defendant was negligent in the discharge of its obligations and duties as a common carrier to plaintiff and his wife as passengers upon its said passenger train under each and all of the foregoing seven counts charging negligence and that the said injuries of himself and wife were the result of such negligence and if upon trial hereof it be found that defendant is chargeable with negligence in either or all of said counts then plaintiff should recover against defendant actual damages in the sum of twelve thousand one hundred dollars for injuries by him sustained and for the benefit of the community estate of himself and wife the sum of five thousand dollars actual damages on account of the injuries done to her.

Plaintiff says that the said injuries to himself and wife accrued through no fault or negligence upon the part of himself and wife or either of them that in any manner contributed thereto, but were the result of the negligence and want of ordinary care and diligence upon the part of defendant, its servants and employés.

That under the laws of the Republic of Mexico as the same then existed and now exist, as well as under the laws of the
12 United States of America and the State of Texas, the facts herein stated present a good cause of action against defendant and thereunder plaintiff is entitled to recover his damages, and he specially pleads as a part of this petition the laws of the Republic of Mexico applicable to the issues hereby tendered; said laws of Mexico being as follows, to wit:

From the Federal Constitution of the Mexican United States.

Art. 72. Congress has power * * * (22) to enact laws governing the general lines of communication, and governing post-offices and mails.

Art. 97. The federal courts have jurisdiction (1) of all questions growing out of the execution and application of the federal laws except when the application of the law only effects interests of individuals in which case the local judges and tribunals of the State shall entertain jurisdiction.

From the Federal Penal Code of Mexico.

Art. 4. A crime is the voluntary infraction of a penal law, doing that which it prohibits or neglecting to do that which it commands.

Art. 5. A misdemeanor is the infraction of police regulations or proclamations and good government.

Art. 6. There are intentional crimes and crimes resulting from neglect.

Art. 11. Negligent crimes exist (1) where an act is done or a duty omitted which although lawful in itself is not so by reason of its consequences if the accused fails to provide against such consequences through negligence, want of reflection or care by not making proper investigations, by not taking necessary precautions, or through unskillfulness in any art or science, the knowledge of which is necessary in order that the act done may not result in injury. Unskillfulness is not punishable when he who does the act does not
13 profess the art or science necessary to be known, and acts when impelled by the gravity and urgency of the case. * * * (3) Where the question relates to an act which is punishable solely by reason of the circumstances under which it is done, or by reason of a circumstance personal to the party aggrieved: If the accused is ignorant of such circumstances through not having previously made the investigation which the duty of his profession or the importance of his case demands.

Penal Code, Book 2—Civil liability in criminal matters.

Art. 301. The civil liability arising from an act or omission contrary to a penal law consists in the obligation imposed on the party liable, to make (1) restitution, (2) reparation, (3) indemnization and (4) payment of judicial expenses.

Art. 304. Reparation comprehends: the payment of all the damages caused to the injured party, to his family or to a third person, for the violation of a right which is formal, existing and not simply possible, if such damages are actual, and arise directly and immediately from the act or omission complained of, or there be a certainty that such act or omission must necessarily cause, as a proximate and inevitable consequence.

Art. 305. Indemnization imports: the payment of damages, that is, of that which the injured party fails to enjoy as a direct and immediate consequence of an act of omission by which a formal existing and not merely possible right is attacked, and of the value of the fruits of the thing usurped and already consumed, in the cases in which the same should be done conformably with civil right.

Art. 306. The condition required by the two preceding articles,

that the damages and injuries should be actual, shall not prevent that the indemnization of subsequent damages and injuries be exacted by a new suit, when they shall have accrued: If they proceed directly from and as a necessary consequence of the same act or omission from which resulted the previous damages or injuries.

14 Art. 307. The payment of judicial expenses solely embraces those absolutely necessary, which the injured party incurs for the purpose of investigating the act or omission which causes the criminal proceeding and to avail himself of his rights in such proceeding or in the civil suit.

Art. 308. The civil responsibility cannot be declared except at the instance of the party entitled to recover.

Art. 309. The judges who adjudicated upon the civil responsibility shall be controlled by the provisions of this title, in so far as its provisions extend, on other questions, they shall follow, according to the nature of the suit, the provisions of the civil or of the commercial laws which may be in effect at the time of the happening of the act or omission causing the civil responsibility.

Art. 310. The right of civil responsibility forms part of the estate of a decedent and descends to his heirs and successors, provided, it be not the case of the following article, or that it arise from injury or defamation, and that, the offended person having been able in his lifetime to bring his suit, he neither did so nor directed his heirs to sue; in such case the offense shall be understood as remitted.

Art. 311. The action to enforce civil responsibility demanding support of a person guilty of homicide is personal, and belongs exclusively to the persons named in the end of article 315, as directly damaged. Consequently such action forms no part of the estate of the deceased, nor is it extinguished, although the latter pardon the offense in life.

Art. 313. The judges who take cognizance of suits based upon civil responsibility shall endeavor that the amount and terms of payment be fixed by agreement of the parties. Failing in this, the provisions of the following article shall be observed. * * *

Art. 321. In case of blows or wounds, from which the in-
15 jured party does not remain crippled, lamed or deformed, he shall have the right that the responsible party pay all his expenses of cure, the damages he may have suffered, and that which he may fail to gain during the time which, in the opinion of competent persons, he may not be able to do the work by which he subsisted. But it is essential that the inability to work should be the direct result of the wounds or blows, or be a cause which is the immediate effect of such blows or wounds.

Art. 322. If the inability of the injured party to devote himself to his accustomed work be permanent, from the moment in which he shall recover and can properly devote himself to other and different work, which may be lucrative and appropriate to his education, habits, social position and physical constitution, the civil responsibility shall be reduced to paying him the sum which his ability to

earn in his new employment falls short of his daily earnings in his former occupation.

Art. 323. If the blows or wounds cause the loss of any member not indispensable for work, or the person wounded or struck remain otherwise crippled, lamed or deformed, by that circumstance, he shall have the right not only to the damages and injuries, but also to the sum which the judge may determine as extraordinary indemnity, considering the social position and sex of the person and the part of the body remaining crippled, lamed or deformed.

Art. 324. The gain which the injured party fails to earn during his inability to work shall be computed by multiplying the sum which he formerly earned per day by the number of days of his disability.

Art. 325. The provisions of the foregoing articles for computing the civil responsibility for wounds or blows shall be applied to all other cases where, in the violation of a penal law, a person may cause the illness of another, or may have placed him under disability to work.

16 Art. 326. No person can be charged with civil liability upon an act or omission contrary to a penal law unless it be proven: That the party sought to be charged usurped the property of another; that without right he caused, by himself or by means of another, damages or injuries to the plaintiff; or that, the party sought to be charged being able to avoid the damages, they were caused by a person under his authority.

Art. 327. Whenever any of the conditions of the preceding articles are established, the defendant shall be civilly liable, without regard to whether he be absolved or condemned to criminal liability.

Art. 330. In order that masters may be held civilly liable through their clerks and servants, according to the provisions of articles 326 and 327 it is an indispensable condition that the acts or omissions of the clerks or servants causing the liability shall occur in the service for which they were employed.

Art. 331. Under the condition of the preceding article, those liable are * * * railroad companies.

Art. 363. Limitation: The various actions by which the civil responsibility may be demanded, or the execution of a final judgment declaring that such responsibility has been incurred by the accused may be asked, shall be extinguished according to the terms and in the manner provided by the civil code or the commercial code, according to the nature of the demand and the subject-matter treated of.

Art. 364. Amnesty shall not extinguish the civil responsibility, nor the actions to exact it, nor the legal rights which third persons may have acquired. Nevertheless, when the responsibility may not yet have been made effective, and the demand is not for restitution, but for reparation of damages, of indemnity for injuries, or for payment of judicial expenses the guilty person shall remain free from such obligations only when it is so declared in the amnesty and they are expressly left to the charge of the public treasury.

17 Art. 365. A pardon shall in no case extinguish the civil responsibility, nor the actions to enforce it, nor the legal rights which third persons may have acquired.

Art. 366. Limitation is interrupted by the criminal proceeding until final judgment is pronounced. This done, the term of limitation commences to run anew.

Transitory Law, Penal Code.

Art. 26. Until it is determined in the new code of procedure what judges shall have jurisdiction and the mode of proceeding, in suits to enforce civil liability, the following rules shall be observed: * * * (5) actions to enforce the civil liability may be brought before a court of civil jurisdiction, whether or not the criminal proceeding has been commenced; but while the latter is pending the proceedings in the former shall be stayed.

From the Federal Civil Code.

Art. 9. Against the observance of the law, disuse, custom, or practice to the contrary cannot be alleged.

Art. 20. When a judicial controversy can be decided neither by the text nor by the natural meaning or spirit of the law, it must be decided according to the general principles of right, taking into consideration all the circumstances of the case.

Art. 21. In case of conflict of rights and the absence of express law for the especial case, the controversy shall be decided in favor of him who seeks to avoid damages, and not in favor of him who seeks to obtain profit. If the conflict should be between equal rights, or rights of the same species, it shall be decided observing the greatest equality possible between the parties.

Art. 1095. Limitation bars in three years: * * * (8) Civil responsibility for injuries, whether done by word or by writing, and that which arises from damage caused by persons or animals, and which the law imposes upon the representatives of such per-
18 sons or the owners of the animals.

Act of Congress of December 15, 1881.

Art. 1. The executive shall regulate the service of railroads, telegraphs and telephones constructed, or which in the future may be constructed, upon Mexican territory, according to the following bases: (1) Railroads, telegraphs and telephones which in the federal district and territory of Lower California unite together two or more municipalities, or the federal district and territory of Lower California with one or more States; those which communicate two or more States with each other; those which touch at any point in the territorial boundary line of the Republic and foreign countries, or run parallel therewith within a region of twenty leagues, are known as general lines of communication within the meaning of fraction 22 of article 72 of the constitution. (2) These general lines of communication and their branches shall be subject exclusively

to the federal legislature, executive and judicial powers, in their respective spheres, in all cases where any of the following matters are involved: * * * (*g*.) Construction and repair of the works. Crimes committed against the security or integrity of the works or against the operations of the lines. (*h*.) Security of the same works for which the companies are obligated, and crimes or misdemeanors of the companies through delays or obstruction, carelessness or fault in the service, and for accidents or mishaps in the operation.

From the regulations for the construction, maintenance, and operation of railroads.

Art. 52. The coaches and cars which enter into the make-up of a train shall have the drawheads of the same height, so that their centers will be opposite to each other.

Art. 53. The conductor of a train en route is the person in command of all the train crew, including the engineer and fireman.

19 Art. 121. Engineers shall communicate by means of a steam whistle with the agents charged with the duty of watching, and with the conductors of trains, using the following signal: * * * Three blasts or sounds of the whistle shall be the signal that the entire train is going to move backward.

Art. 124. Companies (railroad) are liable for accidents which occur through the failure to observe the provisions of this chapter (chapter 7) respecting signals, and for employing people who do not have certificates showing that their sight and hearing are free from infirmity which does not permit them to recognize the signals.

Art. 194. Companies (railway) are liable for all faults or accidents which occur through tardiness, negligence, imprudence or want of capacity of their employés.

Art. 298. All violations of this law, which companies (railway) commit shall be subject to punishment by the administration by fine up to five hundred dollars, which the department of public works shall assess reserving always the right of individuals, through indemnity, and the liability which the companies may have incurred through criminal acts or omissions committed by them.

Plaintiff further alleges that by virtue of the general principles of right and justice, and by virtue of the laws of Mexico hereinbefore set forth, he had at the time of the occurrence of the accident hereinbefore mentioned, and now has, a right of action for his damages against the defendant in the Republic of Mexico, and the same now exists in said country as well as in the United States of America for the injuries done as aforesaid to himself and his wife. And he says that the acts of negligence upon the part of the defendant were wrongful and actionable, as has been hereinbefore shown by the plaintiff, in the Republic of Mexico, at the time of the accident complained of, and are now so, and he says the same were then and are

20 now wrongful and actionable in the United States of America and in the State of Texas and that under the laws of the several countries and governments aforesaid he ought to recover his damages as hereinbefore asked; wherefore plaintiff prays for cita-

tion to defendant in terms of law, and that upon hearing had that he recover of defendant his actual damage in the sum of seventeen thousand one hundred dollars together with all costs in this behalf expended and that he have all such further relief general and special as he may in law and equity be entitled to; as in duty bound will ever pray.

THURMOND & RUSSELL,
Attorneys for Plaintiff, J. M. Duthie.

(Endorsed:) No. 297. J. M. Duthie *vs.* The Mexican Central Railway Co., Limited. Suit for damages for personal injuries. Plaintiff's original petition. Filed Aug. 29th, 1901. D. H. Hart, clerk, by J. P. Hodgson, deputy. Thurmond & Russell, att'ys for plaintiff.

Original Citation.

Issued August 29, 1901; filed August 30, 1901.

Citation in circuit court.

UNITED STATES OF AMERICA,
Western District of Texas, at El Paso, Texas.

The President of the United States to the marshal of the western district of Texas, Greeting:

You are hereby commanded to summon The Mexican Central Railway Company, Limited, a resident citizen of the county of El Paso in the western district of Texas, if to be found therein, to be and appear before the honorable circuit court of the United States, at a court to be holden in and for said district, at El Paso, Texas, on the first Monday, being the 7th day of October, A. D. 1901,
21 and the first day of the next regular term of said court in course, to answer a petition and complaint exhibited and filed in said court on the 29th day of August, A. D. 1901, in a suit numbered on the docket of said court No. 297, wherein J. M. Duthie is plaintiff, and The Mexican Central Railway Company, Limited, is defendant.

The nature of plaintiff's demand is as follows, to wit: Plaintiff sues for damages for personal injuries to himself and his wife, Francis A. Duthie. Alleging that he and his wife were passengers on a passenger train on the Mexican Central railroad on the 22d of July, 1901, and through the negligence of defendant, its servants and employés were injured at a station on defendant's line of railway called Ojo Caliente in the Republic of Mexico. That when the train arrived at said station one of the cars or coaches was disconnected or taken out of the train and left standing on the track. That afterward the remainder of the train was run against said car and started it off down the track and that said car ran off and could not be stopped, that its speed increased to twenty-five to thirty miles per hour, that after it had gone about a half mile, running wild, down the track, the remainder of the train with the engine attached was started after it and caught up with and ran and crashed into

said car. That at the time said car was run into he, plaintiff, was on the part of the train that ran into the car and his wife was on said car. That when the cars crashed together he was thrown and caught between them and his legs and feet pinioned between the cars. That his legs were bruised, mashed and injured. That he was injured in his arms, shoulders, and his body generally bruised and mashed. That his wife was thrown out of the seat in which she was sitting over another seat and onto the floor, striking the floor of the car on her head, whereby she was rendered and remained for a time unconscious. That they have both suffered great physical pain and injury as well as mental pain and anguish. That he has lost time reasonably worth to him ten dollars per day and for
22 at least six months will be unable to pursue his occupation and business. That he is permanently injured in his right leg. That his wife has been permanently injured. He charges that defendant and its servants were negligent in leaving said car on the track not provided, equipped and so arranged as not to run off when run against by the other part of the train. That the attempted coupling was negligently and without due care and prudence made. That when the car was left standing the brakes and appliances for stopping and holding the car were not properly adjusted. That the servants of defendant were unskillful and inefficient and failed to stop said car after it started, that they negligently failed to follow up the car and couple thereto when it first started off. That when the servants of defendant with the other part of the train started out to catch the car, instead of regulating their speed as they approached said car, negligently ran into said car and that the servants and employés were incompetent and unskilled. Plaintiff sues for actual damages in the sum of seventeen thousand one hundred dollars. He alleges his residence to be El Paso, Texas, that the defendant is chartered under the laws of and is a citizen of the State of Massachusetts and owns and operates a line of railway from El Paso, Texas, to the city of Mexico in the Republic of Mexico and that S. R. Comfort is its agent at El Paso, Texas, where it maintains an office. Plaintiff pleads specially the laws of Mexico relating to the subject-matter of the suit. And for further statement of his demand refers to his original petition now on file in the circuit court of the United States of America for the western district of Texas at El Paso, Texas.

And you will deliver to the defendant by delivering to S. R. Comfort, the local agent & representative of defendant at El Paso, Texas, in person a true copy of this writ.

Herein fail not, but have you then and there before said
23 court this writ, with your action thereon, showing how you have executed the same.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court hereto affixed, at El Paso, Texas, this 29th day of August, A. D. 1901, and the 126 year of our Independence. Issued same day.

[SEAL.] D. H. HART,
Clerk of said Court,
By J. P. HODGSON, *Deputy.*

Marshal's Return.

EL PASO, TEXAS.

Received this writ on the 29th day of August, A. D. 1901, and executed the same on the 29th day of August, A. D. 1901, by delivering in person at El Paso, Texas, in my district, a true copy of this writ to S. R. Comfort, the local agent representing the Mexican Central Railway Comp., Limited, in El Paso county, Texas.

GEO. L. SIEBRECHT,
U. S. Marshal,
By H. R. HILLEBRAND, *Deputy.*

(Endorsed:) No. 297. U. S. circuit court, W. D. T., at El Paso, Texas. J. M. Duthie *vs.* The Mexican Central R'y Co., Limited. Original citation for defendant. El Paso county. Issued 29th day of Aug., 1901. D. H. Hart, clerk. By J. P. Hodgson, deputy. Filed Aug. 30th, 1901. D. H. Hart, clerk. By J. P. Hodgson, deputy.

Exception to Citation.

Filed October 7, 1901.

In United States Circuit Court, Western District of Texas, at El Paso, October Term, 1901.

J. M. DUTHIE
vs.
MEXICAN CENTRAL RAILWAY COMPANY, LIMITED. } No. 297.

24 Now, in the above styled and numbered cause, comes the defendant by its attorneys, and says that the citation herein is insufficient in law, in this: That said citation does not correctly state the date of the filing of plaintiff's petition, as provided by law; such citation alleging that plaintiff's petition was filed in said court on the 29th day of October, 1901, as shown by copy of said citation, served upon this defendant, attached hereto and marked "Exhibit A."

Wherefore, defendant prays that service be quashed, and prays for the sufficiency of service upon it.

FALVEY & DAVIS,
Attorneys for Defendant.

Citation in Circuit Court.

UNITED STATES OF AMERICA,
Western District of Texas, at El Paso, Texas.

The President of the United States to the marshal of the western district of Texas, Greeting:

You are hereby commanded to summon The Mexican Central Railway Company, Limited, a resident citizen of the county of El

Paso, Texas, in the western district of Texas, if to be found therein, to be and appear before the honorable circuit court of the United States, at a court to be holden in and for said district, at El Paso, Texas, on the first Monday, being the 7th day of October, A. D. 1901, and the first day of the next regular term of said court in course, to answer a petition and complaint exhibited and filed in said court on the 29th day of October, A. D. 1901, in a suit numbered on the docket of said court No. 297, wherein J. M. Duthie is plaintiff, and The Mexican Central Railway Company, Limited, is defendant.

The nature of plaintiff's demand is as follows, to wit: Plaintiff sues for damages for personal injuries to himself and his wife, Francis A. Duthie. Alleging that he and his wife were
25 passengers on a passenger train on the Mexican Central railroad on the 22d of July, 1901, and through the negligence of defendant, its servants and employés were injured at a station on defendant's line of railway called Ojo Caliente in the Republic of Mexico. That when the train arrived at said station one of the cars or coaches was disconnected or taken out of the train and left standing on the track. That afterward the remainder of the train was run against said car and started it off down the track and that said car ran off and could not be stopped, that its speed increased to twenty-five to thirty miles per hour, that after it had gone about a half mile, running wild, down the track, the remainder of the train with the engine attached was started after it and caught up with and ran and crashed into said car. That at the time said car was run into he, plaintiff, was on the part of the train that ran into the car and his wife was on said car. That when the cars crashed together he was thrown and caught between them and his legs and feet pinioned between the cars. That his legs were bruised, mashed and injured. That he was injured in his arms, shoulders, and his body generally bruised and mashed. That his wife was thrown out of the seat in which she was sitting over another seat and onto the floor, striking the floor of the car on her head, whereby she was rendered and remained for a time unconscious. That they have both suffered great physical pain and injury as well as mental pain and anguish. That he has lost time reasonably worth to him ten dollars per day and for at least six months will be unable to pursue his occupation and business. That he is permanently injured in his right leg. That his wife has been permanently injured. He charges that defendant and its servants were negligent in leaving said car on the track not provided, equipped and so arranged as not to run off when run against by the other part of the train. That the attempted coupling was negligently and without due care and
26 prudence made. That when the car was left standing the brakes and appliances for stopping and holding the car were not properly adjusted. That the servants of defendant were unskillful and inefficient and failed to stop said car after it started, that they negligently failed to follow up the car and couple thereto when it first started off. That when the servants of defendant with

the other part of the train started out to catch the car, instead of regulating their speed as they approached said car, negligently ran into said car and that the servants and employés were incompetent and unskilled. Plaintiff sues for actual damages in the sum of seventeen thousand one hundred dollars. He alleges his residence to be El Paso, Texas, that the defendant is chartered under the laws of and is a citizen of the State of Massachusetts and owns and operates a line of railway from El Paso, Texas, to the city of Mexico in the Republic of Mexico and that S. R. Comfort is its agent at El Paso, Texas, where it maintains an office. Plaintiff pleads specially the laws of Mexico relating to the subject-matter of the suit. And for further statement of his demand refers to his original petition now on file in the circuit court of the United States of America for the western district of Texas at El Paso, Texas.

And you will deliver to the defendant by delivering to S. R. Comfort, the local agent & representative of defendant at El Paso, Texas, in person a true copy of this writ.

Herein fail not, but have you then and there before said court this writ, with your action thereon, showing how you have executed the same.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court hereto affixed, at El Paso, this 29th day of August, A. D. 1901, and the 126 year of our Independence. Issued same day.

[SEAL.]

D. H. HART,
Clerk of said Court,
By J. P. HODGSON, *Deputy.*

27 (Endorsed:) #297. In U. S. circuit court. J. M. Duthie vs. M. C. R'y Co., Lim. Exception to citation. Filed this 7 day of Oct., 1901. D. H. Hart, clerk. By J. P. Hodgson, deputy. Falvey & Davis, att'ys for def't.

Order Sustaining Exception to Citation.

October 9, 1901.

EL PASO, TEXAS, WEDNESDAY, *Octo. 9th, A. D.* 1901.

J. M. DUTHIE
vs.
THE MEXICAN CENTRAL RAILWAY COMPANY, LIMITED. } 297.

Be it remembered, that on this the 8th day of October, 1901, there came on to be heard the exception of the defendant to the citation issued herein, and its motion to quash the service thereof.

And the same having been heard by the court and duly considered, it is the opinion of the court that said exception and motion should be in all things sustained and it is accordingly so ordered, and said cause is set for trial for the 1st Wednesday of the April term of this court A. D. 1902.

Waiver of Service.

Filed March 19, 1902.

THE UNITED STATES OF AMERICA:

To the circuit court of the United States of America for the western dist. of the State of Texas, at its April term, A. D. 1902, held at El Paso, Texas:

THE STATE OF TEXAS, }
County of El Paso. }

In the cause of J. M. Duthie against The Mexican Central Railway Company, Limited, No. 297, now pending in said circuit court of the U. S. A. for the western district of the State of Texas.

28 To the Honorable T. S. Maxey, judge of said court:

Now comes The Mexican Central Railway Company, Limited, defendant in the above cause, through its attorneys, and waives service of citation and enters its appearance to the said April term, A. D. 1902, of said court.

FALVEY & DAVIS,
Attorneys for Defendant, Mexican Central Railway Company, Limited.

El Paso, Texas, February 11, 1902.

(Endorsed:) No. 297. J. M. Duthie *vs.* The Mexican Central R'y Co., Limited. Waiver of service. Filed March 19th, 1902. D. H. Hart, clerk. By J. P. Hodgson, deputy.

Defendant's Original Answer.

Filed April 9, 1902.

In U. S. Cir. Court, April Term, 1902.

J. M. DUTHIE
vs.
M. C. R'Y CO., LIM. } No. 297.

Now comes the defendant in the above styled and numbered cause, and excepting to plaintiff's petition filed herein, *and* says: That same is insufficient in law and fails to state cause of action, and of this the defendant prays judgment of the court.

FALVEY & DAVIS,
Attorneys for said Defendant.

And for further answer in this behalf defendant comes and says: That it denies all and singular the allegations of plaintiff's said petition, and of this it puts itself upon the country.

FALVEY & DAVIS,
Attorneys for said Defendant.

29 (Endorsed:) No. 297. J. M. Duthie *vs.* Mex. Cent. R'y Co., Lim. Defendant's original answer. Filed Ap'l 9, 1902. D. H. Hart, clerk.

Plaintiff's First Amended Original Petition.

Filed March 19, 1902.

J. M. DUTHIE
vs.
THE MEXICAN CENTRAL R'Y CO., LIMITED. } No. 297.

Suit pending in the hon. circuit court of the U. S. A. for the western district of the State of Texas, at El Paso, Texas, at its April term, 1902.

In this cause now comes the plaintiff and, with leave of the court first had, files this his first amended original petition in lieu of his original petition filed herein on the 29th day of August, 1901, and says:

Your petitioner, J. M. Duthie, who is hereinafter styled plaintiff, complaining of The Mexican Central Railway Company, Limited, and which company is hereinafter styled defendant, respectfully represents:

That plaintiff resides in El Paso, in El Paso county, State of Texas, in the western district of said State, and is a citizen of said State and of the United States of America. That defendant is a railway or railroad corporation duly incorporated and chartered under the laws of and is a citizen of the State of Massachusetts in said United States of America, and owns and operates a line of railroad from El Paso to the city of Mexico in the Republic of Mexico, and is now, was on the 22nd day of July, 1901, and for many years prior thereto engaged in and pursuing the business of hauling and carrying by rail, for hire, passengers and freight over its said line to and fro between the cities above named.

That defendant has and maintains in the city of El Paso an
30 office or offices for the transaction of its general business as common carriers of passengers and freight and has and employs there its local agent, whose name is S. R. Comfort.

That plaintiff is a married man of family consisting of himself, his wife, Francis A. Duthie, and their minor son.

That on the 22nd day of July, 1901, at El Paso, Texas, at a cost of about eleven dollars, plaintiff purchased of defendant through its agents, representatives or clerks, transportation for himself, his wife and their child from El Paso to the city of Chihuahua in the Republic of Mexico, and on said date boarded and took passage, with his wife and child, at El Paso upon one of defendant's passenger trains for Chihuahua in said Republic and which said train was then in charge and control and under the management of defendant and its employés and servants. That on said July 22nd, 1901, at or near a station or place on defendant's line of railroad, in the said Repub-

lic of Mexico, called Moctezuma, plaintiff and his wife were, through the negligence, want of ordinary care and diligence on the part of defendant and its servants and employés in charge of and managing said passenger train, greatly and seriously personally injured.

Plaintiff says that when said train arrived at said place or station, for some reason unknown to plaintiff, the train of passenger cars upon which he, his wife and child were passengers, and which train consisted of several coaches, plaintiff is unable to say how many, or cars in which passengers usually travel and such other cars, locomotive, etc., as usually compose and make up a passenger train, was at said Moctezuma disconnected, that is to say one of the coaches or cars was disconnected or taken out of said train, but for what purpose plaintiff does not know, however, said car or coach was for a short while left standing alone upon the track wholly disconnected from the balance of the train, shortly thereafter the remainder of said train, which had been pulled off some distance from said coach
· or car, was backed down to where said coach or car was left
31 standing for the apparent purpose of coupling onto said coach or car, at any event that part of the train to which the locomotive was attached backed down to and against said car, but instead of coupling onto said car ran against and pushed said car backward and started the same off down the track, which was down grade. Plaintiff says that if it was the object of defendant's servants and employés to run down to and couple that part of the train to which the locomotive was attached to said car that the same was negligently, carelessly and without the exercise of reasonable and ordinary care done, so that such coupling or attempt to couple failed and said car was pushed and started off down the track.

Plaintiff says that said car when run against and started off down the track continued to run on down said track and as it proceeded its speed rapidly increased and said car ran on down the track a considerable distance, a mile or more, that after said car had proceeded some distance down the track that part of the train to which the locomotive was attached was by the employés, agents and servants of defendant started down the track in pursuit of said car and for the apparent purpose of catching same and finally did catch and run and crash into said car.

That when said part of the train was backed down to said car for the apparent purpose of coupling thereto, plaintiff was on the coach or car in front of said part of said train, the same going backward at the time, and his wife and child were on said disconnected car, and plaintiff was still on said front car or part of the train to which the locomotive was attached when said part of said train was run and crashed into said car upon which plaintiff's wife and child still were.

That when said part of said train to which the locomotive was attached started out to catch said car, which had theretofore been started off by itself, and was apparently at the time said part
32 of the train to which the locomotive was attached started in pursuit running wild, and appeared to be beyond control, said part of said train was started in pursuit at a high rate of speed

which was increased as said part of said train continued the pursuit of said wild car; that finally said part of said train caught up with said car.

That plaintiff was then near the door or on the platform of the front car, that is to say, the car of the pursuing cars, which was in front backing down upon said wild car; that when said pursuing cars or train caught up with said wild car the pursuing train dashed and crashed into said wild car with tremendous force and with force sufficient to wreck and demolish the ends of the cars coming in contact; that by reason of the force with which said cars came together and crashed into each other and the shock and sudden jar thereby caused, plaintiff was thrown or fell in between said cars and was greatly and seriously damaged and injured; that plaintiff's wife, who was in said wild and disconnected car, was by said force and shock thrown out of the seat in which she was sitting, over the seat in front and greatly and seriously bruised and injured.

Plaintiff says that he was caught between the cars and pinioned there; that in extricating himself, which he finally with great pain and suffering did, his shoes were pulled from his feet and left sticking between said cars where he had been pinioned and held by his legs and feet; that his legs and feet were caught and held in between said cars and badly and seriously mashed, bruised and injured; that he was also wounded, bruised and mashed in his arms, shoulders, back, head and spine, in fact was bruised, beat and mashed all over his body so that he suffered and continued for many days thereafter to suffer most excruciating pain and soreness; that as a consequence of his injuries he, for more than a week thereafter, suffered great bodily pain and was unable on account thereof to sleep and rest;
33 that he was for about twenty-five days, on account of his said injuries, confined to his bed, that for more than a week he was unable to turn his body or move in bed without great inconvenience, annoyance, pain and physical suffering; that for more than thirty-five days after the accident he was unable to sustain any weight or to stand erect upon either of his feet; that he is still unable to bear his weight upon his right foot and his left foot is still sore and tender and in a swollen condition and he is now compelled to use crutches to go about on foot; that his right foot and leg still continues and will continue to be in a crippled, sore and painful condition, and plaintiff, if he is ever able, will not for many months be able to use his right leg and foot except with the aid of crutches; that said right leg, foot and ankle *is* now in crooked and deformed condition and his left foot is still sore, tender and swollen, that the same was caused by the injuries received at the time of and in said accident, and plaintiff believes and charges that said injuries to his right leg, foot and ankle are and will remain permanent and *the* he will not ever again be able to use said right leg, nor can the same ever be restored to the same strength and usefulness as before it was injured as aforesaid. That for several days after plaintiff received the bruises and injuries as aforesaid, he suffered great physical pain and as a result of said injuries and the shock to his mind and general nervous system from said collision and accident was

very sick and came near losing his life and was in much fear that he would die as a result of his said injuries and was thereby caused to suffer and did suffer in addition to the physical pain and torture and as a result thereof, great mental pain, fear and anguish; that ever since said injuries plaintiff has continuously suffered more or less physical pain in his legs, arms and shoulders, and especially has he continued to suffer much pain in his right leg, foot and ankle which is still in a
34 disabled, crippled and deformed condition and permanently injured; that he has continuously suffered from pain and soreness in his right arm which is and has been ever since receiving said injuries in a partially helpless condition, and plaintiff says that — has become afflicted with rheumatism in said right arm and in his shoulders, that he has been compelled to have the attendance, advice and ministration of physicians to attend upon him continuously since his injuries, and that he is advised by his physicians and believes that he now has rheumatism in his said arm and shoulders, and plaintiff never within his knowledge has before been subject to or had an attack of rheumatism, that he is forty-eight years of age and has prior to his said injuries been of stout, robust and perfect health, and he says the condition of his said arm and shoulders is the result of said injuries and directly attributable thereto.

Plaintiff says that on account of his said injuries he has been compelled to lose much time, and that he will never be able again, on account of said injuries, to follow, work at and pursue his usual occupation and business; and that his time is reasonable worth ten dollars per day.

That on account of serious personal bodily injuries done to him as aforesaid, the physical pain and suffering which he has endured and undergone in consequence thereof, and on account of the mental pain and anguish endured and suffered as a result of said injuries, and on account of his being permanently injured and disabled to work or to follow his usual occupation and business he has been damaged in the sum of twelve thousand dollars.

Plaintiff further sues herein for injuries done to his wife, Francis A. Duthie, at the same time and place and says that at the time said cars crashed together his wife was in the car left standing disconnected or the wild car; that she was thrown out of the seat where she was sitting and pitched headforemost out of said seat
35 over the back of another seat and onto the floor of the car and falling on and striking the floor with her head so that she was stunned and rendered unconscious, and had to be assisted out of said car.

That for several days thereafter she suffered severe pain and soreness in her head, neck and shoulders and was for several days confined to her bed as a result of said injuries. Plaintiff says that his wife has been permanently injured as a consequence of being violently thrown upon her head against the floor, in this, that before said accident she was at times subject to fainting spells or epilepsy, but that since her said injuries said fainting spells or epileptic fits

are of much more frequent occurrence than formerly and her suffering therefrom correspondingly increased, and that the frequent recurrence of such fainting spells or epileptic fits is the result of her said injuries and her being thrown upon her head upon the floor of said car.

That as a result of said injuries and the physical pain as well as mental suffering, pain and anguish suffered by her, and on account of the permanent injury to her health by causing the more frequent recurrence of said fainting spells or epileptic fits plaintiff is entitled to recover of defendant for the benefit of the community estate of himself and wife damages in the sum of five thousand dollars as actual damages for the physical pain and mental suffering and anguish suffered by her and for the permanent injury done to her health as aforesaid.

Plaintiff further says that each and all of the wrongs and injuries done to him as well as his wife were caused through the negligence and want of ordinary care and diligence upon the part of defendant and its servants and employés in this:

First. When said car or coach was left standing upon the track defendant and its servants and employés, when the remainder of the train was backed down to be coupled onto said car, if such was the purpose of backing down to said car, the same was negli-
36 gently and carelessly and without the exercise of ordinary care done, and by reason thereof said car and train failed to couple together, either by reason of the careless and negligent manner in which said coupling was attempted to be made or on account of defendant's and its servants' negligence and carelessness in not having the coupling apparatus on said cars properly prepared and adjusted so as to couple together when coming in contact or for both of said reasons said coupling was not effected but instead thereof said car was pushed and run off down the track.

Second. Plaintiff says that before said train backed down to said car for the purpose of coupling thereto defendant and its servants and employés in charge of said train negligently, carelessly and without the use of ordinary care and diligence failed to properly prepare and adjust the couplings to said cars so that when they came together the couplings would catch and hold, that if said couplings had been properly set, prepared and adjusted then said cars would have, if properly brought together, coupled and the accident averted.

Third. That defendant and its servants and employés when said car was left standing upon the track negligently, carelessly and without the exercise of ordinary care and diligence failed to provide and have said car equipped with proper and necessary appliances to prevent said car from moving and to set and leave set the brakes or apparatus for preventing said car from moving, that if said car had been properly provided and equipped with and said brakes or apparatus had been properly attended to, then, although when the other part of the train backed down and against said car and failed to effect a coupling, nevertheless said car could not and would not

have run off in the way it did, but would have moved only a short distance and stopped.

Fourth. That at the time said car started off down the track the servants and employés that were on said car, and plaintiff
37 says that there were servants and employés of defendant aboard of said car, through ignorance, unskillfulness, fright or some other unjustifiable cause were unable to control said car and to stop the same, and failed, for the reason either that they did not know how or the appliances for stopping said car were out of order, to stop said car, wherefore defendant is guilty of negligence and want of ordinary care and diligence in the selection of its servants and employés placed in charge of said car or who were upon the same when it ran off. And if in fact said servants and employés were skillful and no want of ordinary care or negligence can be imputed to defendant in their selection and employment, then defendant was nevertheless guilty of negligence and want of ordinary care and prudence in that the appliances with which said car was equipped and provided for stopping and holding same were inferior, insufficient and unsafe or in such defective condition as not to be available for the purpose for which they were intended, and that they were inferior, insufficient and unsafe and in such defective condition was known or by the use of ordinary care and diligence could have been known to defendant. And if said servants were skillful and efficient and the brakes and appliances for stopping said car were not inferior, insufficient, unsafe nor in a defective condition then defendant's servants were negligent and careless in failing to stop said car.

Fifth. Plaintiff says that when that part of the train backed down to couple to said car and failed to make such coupling and the servants and employés of defendant instead of then following said car with said part of said train and coupling onto and stopping said car negligently and carelessly and without exercising the ordinary care and diligence that the occasion demanded permitted said car to run off and get a considerable distance away before starting after it, when, if when the first attempt and failure to couple thereto
38 was made said part of the train with the locomotive attached had followed up said car the same by the use of proper and ordinary care and diligence could if the coupling appliances were of proper kind and in proper condition have been coupled onto and stopped or at least gotten under control in some way and the accident that resulted in the serious and great injuries done to plaintiff and his wife, as aforestated, been averted and avoided.

Sixth. That when said car was a considerable distance off and going at an increasing rate of speed defendant's servants and employés in charge of and operating the other part of the train started out to catch said car, or judging from the result of the race, to run said car down, and said servants and employés negligently and carelessly and without exercising ordinary care and diligence failed to watch and observe the speed of the runaway or wild car and so regulate the speed of the chasing train as to approach said wild car gradually and without doing damage thereto or to the passengers

upon said car and upon said chasing train, but negligently and carelessly rushed down upon said car at a great rate of speed and consequently crashed into same as hereinbefore set out, and thereby caused the injuries hereinbefore alleged.

Seventh. That defendant was guilty of culpable negligence and want of ordinary care in selecting and employing its servants and employés who were inefficient, incompetent and unskilled in the management and handling trains of cars and, in this instance, acted in a most inefficient, incompetent and unskilled manner, and the accident which resulted in the injuries which are herein complained of was the result of the inefficiency, incompetency and unskillfulness of said servants and employés handling and operating said train of cars. That such inefficiency and unskill-ness of said servants and employés is shown in the fact that said car was left on the track which was at that point on a steep incline without having the brakes so set as to prevent its running away, in the inability and failure to stop said car after it had been started, in the failure to have the couplings so prepared and adjusted as to effect a coupling when the first attempt to couple thereto was made and when they failed to couple, and in running the other part of the train down upon said car without so regulating the speed of the chasing part of the train as to approach said car and catch the same without crashing into it, and in divers other ways as shown by the allegations of negligence hereinbefore set out was the inefficiency, incompetency and unskillfulness of said servants and employés shown and that they were inefficient, incompetent and unskillful was well known to defendant or by the exercise of reasonable care and digilence could have been known to defendant.

39

Plaintiff says that defendant was negligent in the discharge of its obligations and duties as a common carrier to plaintiff and his wife as passengers upon its said passenger train under each and all of the foregoing seven counts charging negligence and that the said injuries to himself and wife were the result of such negligence and if upon trial hereof it be found that defendant is chargeable with negligence in either or all of said counts then plaintiff should recover against defendant actual damages in the sum of twelve thousand dollars for injuries by him sustained and for loss of time, and for the benefit of the community estate of himself and wife the sum of five thousand dollars actual damages on account of the injuries done to her.

Plaintiff says that the said injuries to himself and wife accrued through no fault or negligence upon the part of himself and wife or either of them, that contributed thereto, but were the result of the negligence and want of ordinary care and diligence upon the part of the defendant, its servants and employés.

That said injuries to plaintiff are of a permanent character, that is to say plaintiff's right leg, foot and ankle have been permanently injured, his left foot, ankle and leg permanently disabled and that as a result of his injuries he has become attacked and afflicted with rheumatism and thereby also permanently disabled, that he will continue, even if he secures temporary

40

relief, to be subject to attacks of rheumatism and rheumatic pains much to his annoyance, inconvenience and physical pain and suffering and mental anguish as well as menacing to his life.

That plaintiff has expended large sums in payment for physicians and medical attendance and for medicines for himself and wife since their said injuries and on account of said injuries, and will be compelled to expend further sums for medicines and physicians' services; that to obtain relief from the rheumatism resulting from the injuries received by him, he at a great expense has visited and tried the curative powers of the hot springs at Santa Rosalia, Mexico, but has received but little if any relief therefrom. Wherefore on account of said expenditures to say doctors' bills, medicines and expenses to said hot springs and return and the expenses incident thereto, such as extra costs of living at hotels and away from home, he has incurred an expense of one thousand dollars.

Plaintiff says that at the time of filing his original petition herein rheumatism had not, to his knowledge, then developed and attacked him, nor had he then incurred any expenses for physicians or medicines. Wherefore he prays now for one thousand dollars actual damages in addition to the damages claimed in said original petition and that upon hearing hereof he recover of defendant damages in the total sum of eighteen thousand dollars, and for costs of court and all such other relief general and special as plaintiff may in the premises be entitled to. As in duty bound will ever pray.

THURMOND & RUSSELL,
Attorneys for Plaintiff.

41 (Endorsed:) No. 297. J. M. Duthie *vs.* The Mexican Central Railway Company, Limited. Plaintiff's first amended original petition. Filed M'ch 19th, 1902. D. H. Hart, clerk. J. P. Hodgson, deputy. Thurmond & Russell, attorneys for plaintiff.

Verdict.

Filed April 10, 1902.

J. M. DUTHIE
vs.
MEXICAN CENTRAL RAILWAY CO., L'T'D. } No. 297.

We the jury find for the plaintiff, and assess his damages at $8,500 (eighty-five hundred dollars) of which sum we find $7,500 seventy five hundred dollars, for injuries to himself, and $1,000 one thousand dollars for injuries to his wife, Frances A. Duthie.

T. J. CASSIDY, *Foreman.*

(Endorsed:) No. 297. J. M. Duthie *vs.* The Mex. Cent. R'y Co., Limited. Verdict. Filed Ap'l 10th, 1902. D. H. Hart, clerk. By J. P. Hodgson, deputy.

Judgment.

Entered April 10, 1902.

J. M. DUTHIE
vs.
THE MEXICAN CENTRAL RAILWAY CO., LIMITED. } No. 297.

This cause being called the 9th day of April, 1902, for trial, came the parties plaintiff in person and by his attorneys and defendant by its attorneys and respectively announced themselves ready for trial, whereupon came a jury of twelve good and lawful, duly qualified jurors, to wit, T. J. Cassidy and eleven others, who were
42 duly and legally tried, empaneled and sworn to try said cause and who after hearing the pleadings of the respective parties read and having heard the evidence adduced and on the 10th day of April, A. D. 1902, received the charge of the court, retired to consider of their verdict, and thereafter returned on the same day into open court their verdict, as follows:

"J. M. DUTHIE
vs.
MEXICAN CENTRAL RAILROAD CO., L'T'D. } No. 297.

We the jury find for the plaintiff, and assess his damages at $8,500 (eighty-five hundred dollars) of which sum we find $7,500 (seventy-five hundred dollars) for injuries to himself, and $1,000 (one thousand dollars) for injuries to his wife, Frances A. Duthie.

T. J. CASSIDY, *Foreman.*"

Which said verdict was by the court approved and the jury discharged.

Wherefore, in accordance with the verdict of the jury, it is ordered, adjudged and decreed by the court that the plaintiff, J. M. Duthie, do have and recover of and from the defendant, The Mexican Central Railway Company, Limited, the sum of eight thousand five hundred dollars, as found by the jury, together with all costs in this cause incurred. For all of which let plaintiff have his execution. It is further ordered that the officers of this court have and recover of the respective parties herein the costs by them respectively incurred, for which execution may issue.

Order Extending Time to File Bills of Exception.

Entered April 14, 1902.

EL PASO, TEXAS, *April* 14, *A. D.* 1902.

J. M. DUTHIE
vs.
THE MEXICAN CENTRAL R'Y CO., LIMITED, } 297.

In this cause the Mexican Central Railway Company, Lim-
43 ited, is hereby granted thirty (30) days from and after this date in which to prepare and file its bill of exceptions herein.

Motion of Plaintiff for Leave to Amend Pleading.

Filed April 17, 1902.

In the Circuit Court of the United States of America for the Western District of the State of Texas, Sitting at El Paso, Texas.

J. M. DUTHIE
vs.
THE MEX'N CENT'L R'Y CO., LIM'D. } No. 297.

In this cause now comes the plaintiff, J. M. Duthie, and shows to this hon. court that in alleging the necessary jurisdictional facts in his original and first amended original petitions filed herein on the 29th day of August, 1901, and on the 19th day of March, 1902, respectively, plaintiff omitted and failed to allege that he, plaintiff, was a citizen of the State of Texas and of the United States of America, wherefore he now comes and prays the court that leave be granted him to now amend his said original and first amended petitions by inserting therein the following: "and is a citizen of said State and of the United States of America," after the allegation made in said pleading "that plaintiff resides in El Paso, in El Paso county, State of Texas." And in support of this motion plaintiff upon oath says that he is now and was at the date of filing his original petition herein and was on the 22d of July, 1901, the date of his injuries, a *bona fide* citizen of the United States of America and of the State of Texas.

JOHN M. DUTHIE.

Subscribed and sworn to before me, this 17th day of April, 1902.

SEYMOUR THURMOND,
[SEAL.] *Notary Public, El Paso Co., Texas.*

44 (Endorsed:) No. 297. J. M. Duthie *vs.* The Mex'n Cent'l R'y Co., Lim'd. Motion of plaintiff for leave to amend pleading. Filed Ap'l 17th, 1902. D. H. Hart, clerk. By J. P. Hodgson, deputy.

Order Permitting Amendment of Pleadings.

Entered April 17, 1902.

J. M. DUTHIE
vs.
MEXICAN CENTRAL RAILWAY COMPANY, LIMITED. } No. 297.

THURSDAY, *April* 17, 1902.

In this cause this 17th day of April, 1902, came on to be heard the motion of plaintiff praying leave to amend his original petition and first amended original petition filed herein August 29, 1901, and on the 19th day of March, 1902, respectively, so as to supply the allegation that plaintiff was at the date of institution of this suit a citizen of the State of Texas and of the United States of America.

And the court having heard said motion, and the argument of counsel for the respective parties, each of said parties being represented by counsel present in court, and fully considered the same, is of opinion that the prayer of the motion should be granted. Wherefore it is ordered by the court that plaintiff have leave to now amend his original petition filed herein on the 29th of August, 1901, and his first amended original petition filed herein on the 19th day of March, 1902, by inserting in said original petition and first amended original petition on the first page of said original and amended petitions, after the words and sentence "That plaintiff resides in El Paso, in El Paso county, State of Texas, in the western district of said State," and before the sentence beginning "That defendant is a railway or railroad corporation," etc., an allega-
45 tion in the language and words following to say "and is a citizen of said State and of the United States of America." And thereupon the plaintiff in open court, on this 17th day of April, 1902, made and inserted in said original and first amended petitions the words, "and is a citizen of said State and of the United States of America." To which order of the court granting leave to plaintiff to make the amendment aforesaid, and to the making of such amendment by interlining same in the pleadings without rewriting the pleadings so amended, defendant through its counsel then and there in open court excepted.

Defendant's First, Second, and Third Bills of Exceptions.

Filed April 18, 1902.

In the United States Circuit Court in and for the Western District of Texas, Sitting at El Paso, Texas, April Term, A. D. 1902.

J. M. DUTHIE
vs.
MEXICAN CENTRAL R'Y CO., LIM. } No. 294.

Be it remembered, that upon the trial of the above styled and numbered cause in said court on the 9th and 10th days of April, 1902, this cause was tried on plaintiff's first amended original petition, as follows, to wit:

Suit Pending in the Honorable Circuit Court of the U. S. A. for the Western District of Texas, at El Paso, Texas, at its April Term, 1902.

J. M. GUTHIE
vs.
THE MEXICAN CENTRAL RAILWAY CO., LIM. } No. 297.

46 In this cause now comes the plaintiff and, with leave of the court first had, files this his first amended original petition in lieu of his original petition filed herein on the 29th day of August, 1901, and says:

Your petitioner, J. M. Duthie, who is hereinafter styled plaintiff, complaining of The Mexican Central Railway Company, Limited, and which company is hereinafter styled defendant, respectfully represents:

That plaintiff resides in El Paso, in El Paso county, State of Texas, in the western district of said State. That defendant is a railway or railroad corporation duly incorporated and chartered under the laws of and is a citizen of the State of Massachusetts in said United States of America, and owns and operates a line of railroad from El Paso to the city of Mexico in the Republic of Mexico, and is now, was on the 22nd day of July, 1901, and for many years prior thereto engaged in and pursuing the business of hauling and carrying by rail, for hire, passengers and freight over its said line to and fro between the cities above named.

That defendant has and maintains in the city of El Paso an office or offices for the transaction of its general business as common carriers of passengers and freight and has and employs there its local agent, whose name is S. R. Comfort.

That plaintiff is a married man of family consisting of himself, his wife, Francis A. Duthie, and their minor son.

That on the 22nd day of July, 1901, at El Paso, Texas, at a cost of about eleven dollars, plaintiff purchased of defendant through its agents, representatives or clerks, transportation for himself, his wife

and their child from El Paso to the city of Chihuahua, in the Republic of Mexico, and on said date boarded and took passage, with his wife and child, at El Paso upon one of defendant's passenger trains for Chihuahua in said Republic and which said train
47 was then in charge and control and under the management of defendant and its employés and servants. That on said July 22nd, 1901, at or near a station or place on defendant's line of railroad, in the said Republic of Mexico, called Moctezuma plaintiff and his wife were, through the negligence, want of ordinary care and diligence on the part of defendant and its servants and employés in charge of and managing said passenger train, greatly and seriously personally injured.

Plaintiff says that when said train arrived at said place or station for some reason unknown to plaintiff, the train of passenger cars upon which he, his wife and child were passengers, and which train consisted of several coaches, plaintiff is unable to say how many, or cars in which passengers usually travel and such other cars, locomotive, etc., as usually compose and make up a passenger train, was at said Moctezuma disconnected, that is to say one of the coaches or cars was disconnected or taken out of said train, but for what purpose plaintiff does not know, however said car or coach was for a short while left standing alone upon the track wholly disconnected from the balance of the train, shortly thereafter the remainder of said train, which had been pulled off some distance from said coach or car, was backed down to where said coach or car was left standing for the apparent purpose of coupling onto said coach or car, at any event that part of the train to which the locomotive was attached backed down to and against said car but instead of coupling onto said car ran against and pushed said car backward and started the same off down the track, which was down grade. Plaintiff says that if it was the object of defendant's servants and employés to run down to and couple that part of the train to which the locomotive was attached to said car that the same was negligently, carelessly and without the exercise of reasonable and ordinary care done, so that such coupling or attempt to couple failed and said car was pushed and started off down the track.

48 Plaintiff says that said car when run against and started off down the track continued to run on down said track and as it proceeded its speed rapidly increased and said car ran on down the track a considerable distance, a mile or more, that after said car had proceeded some distance down the track that part of the train to which the locomotive was attached was by the employés, agents and servants of defendant started down the track in pursuit of said car and for the apparent purpose of catching same and finally did catch and run and crash into said car.

That when said part of the train was backed down to said car for the apparent purpose of coupling thereto, plaintiff was on the coach or car in front of said part of said train, the same going backward at the time, and his wife and child were on said disconnected car, and plaintiff was still on said front car or part of the train to which the locomotive was attached when said part of said train was run

and crashed into said car upon which plaintiff's wife and child still were.

That when said part of said train to which the locomotive was attached started out to catch said car, which had theretofore been started off by itself, and was apparently at the time said part of the train to which the locomotive was attached started in pursuit, running wild, and appeared to be beyond control, said part of said train was started in pursuit at a high rate of speed which was increased as said part of said train continued the pursuit of said wild car; that finally said part of said train caught up with said car.

That plaintiff was then near the door or on the platform of the front car, that is to say, the car of the pursuing cars, which was in front backing down upon said wild car; that when said pursuing cars or train caught up with said wild car the pursuing train dashed and crashed into said wild car with tremendous force
49 and with force sufficient to wreck and demolish the ends of the cars coming in contact; that by reason of the force with which said cars came together and crashed into each other and the shock and sudden jar thereby caused, plaintiff was thrown or fell in between said cars and was greatly and seriously damaged and injured; that plaintiff's wife, who was in said wild and disconnected car, was by said force and shock thrown out of the seat in which she was sitting, over the seat in front and greatly and seriously bruised and injured.

Plaintiff says that he was caught between the cars and pinioned there; that in extricating himself, which he finally with great pain and suffering did, his shoes were pulled from his feet and left sticking between said cars where he had been pinioned and held by his legs and feet; that his legs and feet were caught and held in between said cars and badly and seriously mashed, bruised and injured; that he was also wounded, bruised and mashed in his arms, shoulders, back, head and spine, in fact was bruised, beat and mashed all over his body so that he suffered and continued for many days thereafter to suffer most exeruciating pain and soreness; that as a consequence of his injuries he, for more than a week thereafter, suffered great bodily pain and was unable on account thereof to sleep and rest; that he was for about twenty-five days, on account of his said injuries confined to his bed, that for more than a week he was unable to turn his body or move in bed without great inconvenience, annoyance, pain and physical suffering; that for more than thirty-five days after the accident he was unable to sustain any weight, or to stand erect upon either of his feet; that he is still unable to bear his weight upon his right foot and his left foot is still sore and tender and in a swollen condition and he is now compelled to use crutches to go about on foot; that his right foot and leg still continues and will continue to be in a crippled, sore and painful condition, and plaintiff, if he is ever able, will not for many months be able
50 to use his right leg and foot except with the aid of crutches; that said right leg, foot and ankle is now in crooked and deformed condition and his left leg is still sore, tender and swollen,

that the same was caused by the injuries received at the time of and in said accident, and plaintiff believes and charges that said injuries to his right leg, foot and ankle are and will remain permanent and that he will not ever again be able to use said right leg, nor can the same ever be restored to the same strength and usefulness as before it was injured as aforesaid. That for several days after plaintiff received the bruises and injuries as aforesaid, he suffered great physical pain and as a result of said injuries and the shock to his mind and general nervous system from said collision and accident was very sick and came near losing his life and was in much fear that he would die as a result of his said injuries and was thereby caused to suffer and did suffer in addition to the physical pain and torture and as a result thereof, great mental pain, fear and anguish; that ever since said injuries plaintiff has continually suffered more or less physical pain in his legs, arms and shoulders, and especially has he continued to suffer much pain in his right leg, foot and ankle which is still in a disabled, crippled and deformed condition and permanently injured; that he has continuously suffered from pain and soreness in his right arm which is and has been ever since receiving said injuries in a partially helpless condition, and plaintiff says that — has become afflicted with rheumatism in said right arm and in his shoulders, that he has been compelled to have the attendance, advice and ministration of physicians to attend upon him continuously, since his injuries, and that he is advised by his physicians and believes that he now has rheumatism in his said arm and shoulders, and plaintiff never within his knowledge has before been subject to or had an attack of rheumatism, that
51 he is forty-eight years of age and has prior to his said injuries been of stout, robust and perfect health, and he says the condition of his said arm and shoulders is the result of said injuries and directly attributable thereto.

Plaintiff says that on account of his said injuries he has been compelled to lose much time, and that he will never be able again, on account of said injuries, to follow, work at and pursue his usual occupation and business; and that his time is reasonably worth ten dollars per day.

That on account of serious personal bodily injuries done to him as aforesaid, the physical pain and suffering which he has endured and undergone in consequence thereof, and on account of the mental pain and anguish endured and suffered as a result of said injuries, and on account of his being permanently injured and disabled to work or to follow his usual occupation and business he has been damaged in the sum of twelve thousand dollars.

Plaintiff further sues herein for injuries done to his wife, Francis A. Duthie, at the same time and place and says that at the time said cars crashed together his wife was in the car left standing disconnected or the wild car; that she was thrown out of the seat where she was sitting and pitched headforemost out of said seat over the back of another seat and onto the floor of the car and falling on and striking the floor with her head so that she was stunned and rendered unconscious and had to be assisted out of said car.

That for several days thereafter she suffered severe pain and soreness in her head, neck and shoulders and was for several days confined to her bed as a result of said injuries. Plaintiff says that his wife has been permanently injured as a consequence of being violently thrown upon her head against the floor, in this, that before said accident she was at times subject to fainting spells or epilepsy,
but that since her said injuries said fainting spells or epileptic
52 fits are of much more frequent occurrence than formerly and
her suffering therefrom correspondingly increased, and that the frequent recurrence of such fainting spells or epileptic fits is the result of her said injuries and her being thrown upon her head upon the floor of said car.

That as a result of said injuries as the physical pain as well as mental suffering, pain and anguish suffered by her, and on account of the permanent injury to her health by causing the more frequent recurrence of said fainting spells or epileptic fits, plaintiff is entitled to recover of defendant for the benefit of the community estate of himself and wife damages in the sum of five thousand dollars as actual damages for the physical pain, and mental suffering and anguish, suffered by her and for the permanent injury done to her health as aforesaid.

Plaintiff further says that each and all of the wrongs and injuries done to him as well as his wife were caused through the negligence and want of ordinary care and diligence upon the part of defendant and its servants and employés in this:

First. When said car or coach was left standing upon the track defendant and its servants and employés, when the remainder of the train was — backing down to said car, the same was negligently and carelessly and without the exercise of ordinary care done, and by reason thereof said car and train failed to couple together, either by reason of the careless and negligent manner in which said coupling was attempted to be made or on account of defendant's and its servants' negligence, and carelessness in not having the coupling apparatus on said cars properly prepared and adjusted so as to couple together when coming in contact or for both of said reasons said coupling was not effected, but instead thereof said car was pushed and run off down the track.

Second. Plaintiff says that before said train backed down to said car for the purpose of coupling thereto defendant and its servants
and employés in charge of said train negligently, carelessly
53 and without the use of ordinary care and diligence failed to
properly prepare and adjust the couplings to said cars so that when they come together the couplings would catch and hold, that if said couplings had been properly set, prepared and adjusted then said cars would have, if properly brought together, coupled and the accident averted.

Third. That defendant and its servants and employés when said car was left standing upon the track negligently, carelessly and without the exercise of ordinary care and diligence failed to provide and have said car equipped with proper and necessary appliances to prevent said car from moving and to set and leave set the brakes

or apparatus for preventing said car from moving, that if said car had been properly provided, and equipped with and said brakes or apparatus had been properly attended to, then, although when the other part of the train backed down and against said car and failed to effect a coupling, nevertheless said car could not and would not run off in the way it did, but would have moved only a short distance and stopped.

Fourth. That at the time said car started off down the track the servants and employés that were on said car, and plaintiff says that there were servants and employés of defendant aboard of said car, through ignorance, unskillfulness, fright or some other unjustifiable cause were unable to control said car and to stop the same, and failed, for the reason either that they did not know how or the appliances for stopping said car were out of order, to stop said car, wherefore defendant is guilty of negligence and want of ordinary care and diligence in the selection of its servants and employés placed in charge of said car or who were upon the same when it ran off. And if in fact said servants and employés were skillful and no want of ordinary care or negligence can be imputed to defendant in their selection and employment, then defendant was nevertheless guilty of negligence and want of ordinary care
54 and prudence in that the appliances with which said car was equipped and provided for stopping and holding same were inferior, insufficient and unsafe, or in such defective condition as not to be available for the purpose for which they were intended, and that they were inferior, insufficient and unsafe and in such defective condition was known or by the use of ordinary care and diligence could have been known to defendant. And if said servants were skillful and efficient and the brakes and appliances for stopping said car were not inferior, insufficient, unsafe nor in a defective condition then defendant's servants were negligent and careless in failing to stop said car.

Fifth. Plaintiff says that when that part of the train backed down to couple to said car and failed to make such coupling and the servants and employés of defendant instead of then following said car with said part of said train and coupling onto and stopping said car negligently and carelessly and without exercising the ordinary care and diligence that the occasion demanded permitted said car to run off and get a considerable distance away before starting after it, when, if when the first attempt and failure to couple thereto was made said part of the said train with the locomotive attached had followed up said car the same by the use of proper and ordinary care and diligence could if the coupling appliances were of proper kind and in proper condition have been coupled onto and stopped or at least gotten under control in some way and the accident that resulted in the serious and great injuries done to plaintiff and his wife, as aforestated, been averted and avoided.

Sixth. That when said car was a considerable distance off and going at an increasing rate of speed defendant's servants and employés in charge of and operating the other part of the train started out to catch said car, or judging from the result of the race, to run

said car down, and said servants and employés negligently and carelessly and without exercising ordinary care and diligence
55 failed to watch and observe the speed of the runaway or wild car and so regulate the speed of the chasing train as to approach said wild car gradually and without doing damage thereto or to the passengers upon said car and upon said chasing train, but negligently and carelessly rushed down upon said car at a great rate of speed and consequently crashed into same as hereinbefore set out, and thereby caused the injuries hereinbefore alleged.

Seventh. That defendant was guilty of culpable negligence and want of ordinary care in selecting and employing its servants and employés who were inefficient, incompetent and unskilled in the management in and handling trains of cars and, in this instance, acted in a most inefficient, incompetent and unskilled manner, and the accident which resulted in the injuries which are herein complained of was the result of the inefficiency, incompetency and unskillfulness of said servants and employés handling and operating said train of cars. That such inefficiency and unskillfulness of said servants and employés is shown in the fact that said car was left on the track which was at that point on a steep incline, without having the brakes so set as to prevent its running away, in the inability and failure to stop said car after it had been started, in the failure to have the couplings so prepared and adjusted as to effect a coupling when the first attempt to couple thereto was made and when they failed to couple, and in running the other part of the train down upon said car without so regulating the speed of the chasing part of the train as to approach said car and catch the same without crashing into it, and in divers other ways as shown by the allegations of negligence hereinbefore set out was the inefficiency, incompetency and unskillfulness of said servants and employés shown and that they were inefficient, incompetent and unskillful was well known to defendant or by the exercise of reasonable care and diligence could have been known to defendant.

56 Plaintiff says that defendant was negligent in the discharge of its obligations and duties as a common carrier to plaintiff and his wife as passengers upon its said passenger train under each and all of the foregoing seven counts charging negligence and that the said injuries of himself and wife were the result of such negligence and if upon trial hereof it be found that defendant is chargeable with negligence in either or all of said counts then plaintiff should recover against defendant actual damages in the sum of twelve thousand dollars for injuries by him sustained and for loss of time, and for the benefit of the community estate of himself and wife the sum of five thousand dollars actual damages on account of the injuries done to her.

Plaintiff says that the said injuries to himself and wife accrued through no fault or negligence upon the part of himself and wife, or either of them, that contributed thereto, but were the result of the negligence and want of ordinary care and diligence upon the part of the defendant, its servants and employés.

That said injuries to plaintiff are of a permanent character, that

is to say plaintiff's right leg, foot and ankle have been permanently injured, his left foot, ankle and leg permanently disabled and that as a result of his injuries he has become attacked and afflicted with rheumatism and thereby also permanently disabled, that he will continue, even if he secures temporary relief, to be subject to attacks of rheumatism and rheumatic pains much to his annoyance, inconvenience and physical pain and suffering and mental anguish as well as menacing to his life.

That plaintiff has expended large sums in payment for physicians and medical attendance and for medicines for himself and wife since their said injuries and on account of said injuries, and will be compelled to expend further sums for medicine and
57 physicians' services; that to obtain relief from the rheumatism resulting from the injuries received by him, he, at a great expense, has visited and tried the curative powers of the hot springs at Santa Rosalia, Mexico, but has received but little if any relief therefrom. Wherefore on account of said expenditures to say doctors' bills, medicines and expenses to said hot springs and return and the expenses incident thereto, such as extra costs of living at hotels and away from home, he has incurred an expense of one thousand dollars.

Plaintiff says that at the time of filing his original petition herein rheumatism had not, to his knowledge, then developed and attacked him, nor had he then incurred any expenses for physicians or medicines. Wherefore he prays now for one thousand dollars actual damages in addition to the damages claimed in said original petition, and that upon hearing hereof he recover of defendant damages in the total sum of eighteen thousand dollars, and for costs of court and all such other relief general and special as plaintiff may in the premises be entitled to. As in duty bound will ever pray.

(Signed) THURMOND & RUSSELL,
Attorneys for Plaintiff.

That plaintiff's original petition as to all jurisdictional averments is as follows:

THE UNITED STATES OF AMERICA:

To the hon. circuit court for the western district of the State of Texas, at its October term, 1901, held at El Paso, Texas:

THE STATE OF TEXAS,
County of El Paso, Western District of the State of Texas.

To the Hon. T. S. Maxey, judge of said court:

Your petitioner, J. M. Duthie, who is hereinafter styled plaintiff, complaining of The Mexican Central Railway Company,
58 Limited, and which company is hereinafter styled defendant, respectfully represents:

That plaintiff resides in El Paso, in El Paso county, State of Texas, in the western district of said State. That defendant is a railway or

railroad corporation duly incorporated and chartered under the laws of and is a citizon of the State of Massachusetts, in said United States of America, and owns and operates a line of railroad from El Paso to the city of Mexico in the Republic of Mexico, and is now, was on the 22nd day of July, 1901, and for many years prior thereto engaged in and pursuing the business of hauling and carrying by rail, for hire, passengers and freight over its said line to and fro between the cities above named.

That defendant has and maintains in the city of El Paso an office or offices for the transaction of its general business as common carriers of passengers and freight and has and employs there its local agent, whose name is S. R. Comfort.

That plaintiff is a married man of family consisting of himself, his wife Francis A. Duthie, and their minor son.

That this cause was tried on defendant's original answer, as follows to wit:

In U. S. Cir. Court, April Term, 1902.

J. M. DUTHIE
vs
MEXICAN CENTRAL R'Y CO., LIM. } No. 297.

Now comes the defendant in the above styled and numbered cause, and excepting to plaintiff's petition filed herein says: That same is insufficient in law and fails to state cause of action, and of this the defendant prays judgment of the court.

And for further answer in this behalf defendant comes and says that it denies all and singular the allegations of plaintiff's said petition, and of this it puts itself upon the country.

59 That at said trial on said date defendant presented its general demurrer to plaintiff's said petition for action by the court, and the court then and there in open court overruled said general demurrer as shown by the following, to wit:

"J. M. DUTHIE
vs.
THE MEXICAN CENTRAL R'Y CO., LIM. } No. 297.

In this cause this 9th day of April, came on to be heard the general demurrer and exception of defendant to plaintiff's amended petition and the same being heard by, and duly submitted to the court, it is hereby overruled, to which ruling of the court defendant duly excepted."

That after said demurrer was overruled each party announced ready for trial, and the pleadings being read, the evidence was offered in behalf of both parties. No evidence having been adduced by either party as to plaintiff's or defendant's residence, domicile, habitation or citizenship.

That upon the pleadings and proof in the cause the court instructed the jury to find a verdict for the plaintiff for such damages

as plaintiff had sustained; that the jury on the 10th day of April, 1902, returned into open court the following verdict, to wit:

"J. M. DUTHIE
vs.
MEXICAN CENTRAL RAILWAY CO., L'T'D. } No. 297.

We the jury find for the plaintiff and assess his damages at $8,500 (eighty-five hundred dollars), of which sum we find $7,500 seventy-five hundred dollars for injuries to himself, and $1,000 one thousand dollars for injuries to his wife, Frances A. Duthie.

T. J. CASSIDY, *Foreman.*"

60 That on said 10th day of April, 1902, judgment was entered upon said verdict, as follows:

"J. M. DUTHIE
vs.
THE MEXICAN CENTRAL R'Y CO., LIM. } No. 297.

This cause being called this 9th day of April, 1902, for trial, came the parties, plaintiff in person and by his attorneys and defendant by its attorneys and respectively announced themselves ready for trial, whereupon came a jury of twelve good and lawful, duly qualified jurors, to wit: T. J. Cassidy and eleven others, who were duly and legally tried, impaneled and sworn to try said cause, and who after hearing the pleadings of the respective parties read, and having heard the evidence adduced, and on the following day, to say, this April 10th, 1902, received the charge of the court, retired to consider of their verdict and thereafter returned on the same day into open court their verdict, as follows:

'J. M. DUTHIE
vs.
MEXICAN CENTRAL R'Y CO., L'T'D. } No. 297.

We the jury find for the plaintiff and assess his damages at $8,500 (eighty-five hundred dollars), of which sum we find $7,500 seventy-five hundred dollars for injuries to himself and $1,000 one thousand dollars for injuries to his wife Frances A. Duthie.

T. J. CASSIDY, *Foreman.*'

And which said verdict was by the court approved, and the jury discharged, wherefore, in accordance with the verdict of the jury, it is ordered, adjudged, and decreed by the court that the plaintiff J. M. Duthie do have and recover of and from the defendant
61 The Mexican Central Railway Company, Limited, the sum of eight thousand five hundred dollars as found by the jury, together with all costs in this case incurred, for all of which let plaintiff have his execution. It is further ordered that the officers of this court have and recover of the respective parties herein the cost by them respectively incurred."

That no further proceedings were had in said cause after the entry

of said judgment until, to wit: the 17th day of April, 1902, on which day plaintiff filed his motion asking leave to amend his petition, which motion is as follows:

"In the Circuit Court of the United States of America for the Western District of the State of Texas, Sitting at El Paso, Texas.

J. M. DUTHIE
vs.
MEXICAN CENTRAL R'Y CO., LIM'T. } No. 297.

In this cause now comes the plaintiff J. M. Duthie and shows to this honorable court that in alleging the necessary jurisdictional facts in his original and first amended original petitions filed herein on the 29th day of August, 1901, and on the 19th day of March, 1902, respectively, plaintiff omitted and failed to allege that he, plaintiff, was a citizen of the State of Texas and of the United States of America. Wherefore he now comes and prays the court that leave be granted him to now amend his said original and first amended petition by inserting therein the following: 'and is a citizen of said State and of the United States of America,' after the allegation made in said pleading 'that plaintiff resides in El Paso, in El Paso county, State of Texas,' and in support of this motion plaintiff upon oath says that he is now and was at the date of filing his original petition herein and was on the 22nd day of July, 1901, the date of his injuries, a *bona fide* citizen of the United States
62 of America and of the State of Texas.

JOHN M. DUTHIE.

Subscribed and sworn to before me this 17th day of April, 1902.
[SEAL.] SEYMOUR THURMOND,
Notary Public, El Paso Co., Texas."

That defendant objected to the granting of said motion on the ground that the court was without power to permit an amendment of the pleadings and alteration of the record without setting aside and holding for naught the verdict and judgment entered herein, but should dismiss said cause for want of jurisdiction.

That said motion coming on to be heard on said 17th day of April, 1902, the court in said cause made the following order, to wit:

"J. M. DUTHIE
vs.
THE MEXICAN CENTRAL RAILWAY CO., LIM. } No. 297.

In this cause this 17th day of April, 1902, came on to be heard the motion of plaintiff praying leave to amend his original petition and first-amended original petition filed herein, August 29th, 1901, and on the 19th day of March, 1902, respectively, so as to supply the allegation that plaintiff was at the date of institution of this suit a citizen of the State of Texas and of the United States of America, and the court having heard said motion and the argument of counsel by the respective parties, each of said parties being represented

by counsel present in court, and fully considered the same, is of opinion that the prayer of the motion should be granted; wherefore, it is ordered by the court that plaintiff have leave to
63 now amend his original petition filed herein on the 29th day of August, 1901, and his first amended original petition filed herein on the 19th day of March, 1902, by inserting in said original petition and amended original petition, on the first page of said original and amended petitions, after the words and sentence, 'That plaintiff resides in El Paso, in El Paso county, State of Texas, in the western district of said State,' and before the sentence beginning, 'That defendant is a railway or railroad corporation,' etc., and allegations in the language and words following to say: 'And is a citizen of said State and of the United States of America,' and thereupon the plaintiff in open court on this 17th day of April, 1902, made and inserted in said original and first amended petitions the words: 'And is a citizen of said State and of the United States of America.' To which order of the court granting leave to plaintiff to make the amendment aforesaid and to the making of such amendment by interlining same in the pleadings without rewriting the pleadings so amended, defendant through its counsel then and there in open court excepted."

That to the action of the court in refusing to dismiss this cause and in allowing said order permitting said amendment to be made to said pleadings without first setting aside the verdict and judgment herein, defendant then and there in open court excepted, and the court permitted plaintiff without filing an amendment in said cause, and without setting aside the judgment heretofore rendered, to insert in his original petition and his amended petition hereinabove set out, in paragraph three thereof, the words: "And is a citizen of said State and of the United States of America," after that part of said paragraph reading as follows: "That plaintiff resides in El Paso, El Paso county, State of Texas, in the western district of said State," and defendant then and there objected to the action of the court in permitting the plaintiff to insert the said words
64 in his original and amended petition without requiring the plaintiff to rewrte and file a new amendment, which objection was overruled by the court, to which action of the court defendant then and there in open court excepted and now herewith tenders this its first, second and third bills of exceptions, asking that same be signed, sealed and approved by the court and made a part of the record herein, which is accordingly done, this the 18th day of April, 1902.

T. S. MAXEY, *Judge.*

(Endorsed:) No. 297. J. M. Duthie *vs.* Mex. Central R'y Co., Lim Defendant's 1st, 2nd and 3rd bills of exceptions. Filed Ap'l 18th 1902. D. H. Hart, clerk. By J. P. Hodgson, deputy.

Order of Court as to Certificate of Jurisdiction.

Entered April 18, 1902.

In the Circuit Court of the United States, Western District of Texas, El Paso Division.

J. M. DUTHIE
vs.
THE MEXICAN CENTRAL RAILWAY CO., L'T'D. } No. 297.

APRIL 18, 1902.

Be it remembered, that in the above styled and numbered cause, the court being in session for its April term, 1902, term at which the above styled and numbered cause was tried and judgment therein rendered, defendant presented, to be certified to the Supreme Court of the United States of America, certain questions and matters concerning and affecting the jurisdiction of this court, which questions and matters were duly certified, as per certificate of the court filed in this cause this day.

65 *Certificate of Jurisdictional Questions.*

Filed April 18, 1902.

IN THE UNITED STATES OF AMERICA, }
Western District of Texas. }

In the United States Circuit Court for the Western District of Texas, Sitting at El Paso, Texas, April Term, A. D. 1902.

J. M. DUTHIE
vs.
THE MEXICAN CENTRAL R'Y CO., LIM. } No. 297.

I, T. S. Maxey, judge of said court, during this April term, 1902, of said court, said term being the same term at which the above styled and numbered cause was tried and at which judgment was therein rendered, this court now being still in session for said term, do hereby certify that on the 29th day of August, 1901, plaintiff brought this suit, on said date filing his original petition which is referred to hereafter in this certificate; that this cause was tried and judgment was rendered in this cause upon the plaintiff's first amended original petition filed herein March 19th, 1902, of which the following is a copy:

Suit Pending in the Honorable Circuit Court of the U. S. A. for the Western District of Texas, at El Paso, Texas, at its April Term, 1902.

J. M. DUTHIE
vs.
THE MEXICAN CENTRAL RAILWAY CO., LIM. } No. 297.

In this cause now comes the plaintiff and with leave of the
66 court first had, files this his first amended original petition in lieu of his original petition filed herein on the 29th day of August, 1901, and says:

Your petitioner, J. M. Duthie, who is hereinafter styled plaintiff, complaining of The Mexican Central Railway Company, Limited, and which company is hereinafter styled defendant, respectfully represents:

That plaintiff resides in El Paso, in El Paso county, State of Texas, in the western district of said State. That defendant is a railway or railroad corporation duly incorporated and chartered under the laws of and is a citizen of the State of Massachusetts in said United States of America, and owns and operates a line of railroad from El Paso to the city of Mexico in the Republic of Mexico, and is now, was on the 22nd day of July, 1901, and for many years prior thereto, engaged in and pursuing the business of hauling and carrying by rail, for hire, passengers and freight over its said line to and fro between the cities above named.

That defendant has and maintains in the city of El Paso an office or offices for the transaction of its general business as common carriers of passengers and freight and has and employs there its local agent, whose name is S. R. Comfort.

That plaintiff is a married man of family consisting of himself, his wife, Francis A. Duthie, and their minor son.

That on the 22nd day of July, 1901, at El Paso, Texas, at a cost of about eleven dollars, plaintiff purchased of defendant through its agents, representatives or clerks, transportation for himself, his wife and their child from El Paso to the city of Chihuahua, in the Republic of Mexico, and on said date boarded and took passage, with his wife and child, at El Paso upon one of defendant's passenger trains for Chihuahua in said Republic and which said train was then in charge and control and under the management of defendant
and its employés and servants. That on said July 22nd,
67 1901, at or near a station or place on defendant's line of railroad, in the said Republic of Mexico, called Moctezuma, plaintiff and his wife were, through the negligence, want of ordinary care and diligence on the part of defendant and its servants and employés in charge of and managing said passenger train, greatly and seriously personally injured.

Plaintiff says that when said train arrived at said place or station for some reason unknown to plaintiff, the train of passenger cars upon which he, his wife and child were passengers, and which train consisted of several coaches, plaintiff is unable to say how many, or cars in which passengers usually travel, and such other cars, loco-

motive, etc., as usually compose and make up a passenger train, was at said Moctezuma disconnected, that is to say one of the coaches or cars was disconnected or taken out of said train, but for what purpose plaintiff does not know, however said car or coach was for a short while left standing alone upon the track wholly disconnected from the balance of the train, shortly thereafter the remainder of said train, which had been pulled off some distance from said coach or car, was backed down to where said coach or car was left standing for the apparent purpose of coupling onto said coach or car, at any event that part of the train to which the locomotive was attached backed down to and against said car, but instead of coupling onto said car ran against and pushed said car backward and started the same off down the track, which was down grade. Plaintiff says that if it was the object of defendant's servants and employés to run down to and couple that part of the train to which the locomotive was attached to said car that the same was negligently, carelessly and without the exercise of reasonable and ordinary care done, so that such coupling or attempt to couple failed and said car was pushed and started off down the track.

Plaintiff says that said car when run against and started off down the track continued to run on down said track and as it pro-
68 ceeded its speed rapidly increased and said car ran on down the track a considerable distance, a mile or more, that after said car had proceeded some distance down the track that part of the train to which the locomotive was attached was by the employés, agents and servants of defendant started down the track in pursuit of said car and for the apparent purpose of catching same and finally did catch and run and crash into said car.

That when said part of the train was backed down to said car for the apparent purpose of coupling thereto, plaintiff was on the coach or car in front of said part of said train, the same going backward at the time, and his wife and child were on said disconnected car, and plaintiff was still on said front car or part of the train to which the locomotive was attached when said part of said train was run and crashed into said car upon which plaintiff's wife and child still were.

That when said part of said train to which the locomotive was attached started out to catch said car, which had theretofore been started off by itself, and was apparently at the time said part of the train to which the locomotive was attached started in pursuit, running wild, and appeared to be beyond control, said part of said train was started in pursuit at a high rate of speed which was increased as said part of said train continued the pursuit of said wild car; that finally said part of said train caught up with said car.

That plaintiff was then near the door or on the platform of the front car, that is to say, the car of the pursuing cars, which was in front backing down upon said wild car; that when said pursuing cars or train caught up with said wild car the pursuing train dashed and crashed into said wild car with tremendous force and with force sufficient to wreck and demolish the ends of the cars coming in contact; that by reason of the force with which said cars

came together and crashed into each other and the shock and
69 sudden jar thereby caused, plaintiff was thrown or fell in
between said cars and was greatly and seriously damaged and injured; that plaintiff's wife, who was in said wild and disconnected car, was by said force and shock thrown out of the seat in which she was sitting, over the seat in front and greatly and seriously bruised and injured.

Plaintiff says that he was caught between the cars and pinioned there; that in extricating himself, which he finally with great pain and suffering did, his shoes were pulled from his feet and left sticking between said cars where he had been pinioned and held by his legs and feet; that his legs and feet were caught and held in between said cars and badly and seriously mashed, bruised and injured; that he was also wounded, bruised and mashed in his arms, shoulders, back, head and spine, in fact was bruised, beat and mashed all over his body so that he suffered and continued for many days thereafter to suffer most excruciating pain and soreness; that as a consequence of his injuries he, for more than a week thereafter, suffered great bodily pain and was unable on account thereof to sleep and rest; that he was for about twenty-five days, on account of his said injuries, confined to his bed, that for more than a week he was unable to turn his body or move in bed without great inconvenience, annoyance, pain and physical suffering; that for more than thirty-five days after the accident he was unable to sustain any weight, or to stand erect, upon either of his feet; that he is still unable to bear his weight upon his right foot and his left foot is still sore and tender and in a swollen condition and he is now compelled to use crutches to go about on foot; that his right foot and leg still continues and will continue to be in a crippled, sore and painful condition, and plaintiff, if he is ever able, will not for many months, be able to use his right leg and foot except with the aid of crutches; that said right leg, foot and ankle *is* now in crooked and deformed
condition and his left foot is still sore, tender and swollen,
70 that the same was caused by the injuries received at the time
of and in said accident, and plaintiff believes and charges that said injuries to his right leg, foot and ankle are and will remain permanent and that he will not ever again be able to use said right leg, nor can the same ever be restored to the same strength and usefulness as before it was injured as aforesaid. That for several days after plaintiff received the bruises and injuries as aforesaid, he suffered great physical pain and as a result of said injuries and the shock to his mind and general nervous system from said collision and accident was very sick and came near losing his life and was much in fear that he would die as a result of his said injuries and was thereby caused to suffer and did suffer in addition to the physical pain and torture and as a result thereof, great mental pain, fear and anguish; that ever since said injuries plaintiff has continually suffered more or less physical pain in his legs, arms and shoulders, and especially has he continued to suffer much pain in his right leg, foot and ankle which is still in a disabled, crippled and deformed condition and permanently injured; that he has con-

tinuously suffered from pain and soreness in his right arm which is and has been ever since receiving said injuries in a partially helpless condition, and plaintiff says that — has become afflicted with rheumatism in said right arm and in his shoulders, that he has been compelled to have the attendance, advice and ministration of physicians to attend upon him continuously since his injuries, and that he is advised by his physicians and believes that he now has rheumatism in his said arm and shoulders, and plaintiff never within his knowledge has before been subject to or had an attack of rheumatism, that he is forty-eight years of age and has prior to his said injuries been of stout, robust and perfect health, and he says the condition of his said arm and shoulders is the result of said injuries and directly attributable thereto.

71 Plaintiff says that on account of his said injuries he has been compelled to lose much time, and that he will never be able again, on account of said injuries, to follow, work at and pursue his usual occupation and business; and that his time is reasonable worth ten dollars per day.

That on account of serious personal bodily injuries done to him as aforesaid, the physical pain and suffering which he has endured and undergone in consequence thereof, and on account of the mental pain and anguish endured and suffered as a result of said injuries, and on account of his being permanently injured and disabled to work or to follow his usual occupation and business he has been damaged in the sum of twelve thousand dollars.

Plaintiff further sues herein for injuries done to his wife, Francis A. Duthie, at the same time and place and says that at the time said cars crashed together his wife was in the car left standing disconnected or the wild car; that she was thrown out of the seat where she was sitting and pitched headforemost out of said seat over the back of another seat and onto the floor of the car and falling on and striking the floor with her head so that she was stunned and rendered unconscious and had to be assisted out of said car.

That for several days thereafter she suffered severe pain and soreness in her head, neck and shoulders and was for several days confined to her bed as a result of said injuries. Plaintiff says that his wife has been permanently injured as a consequence of being violently thrown upon her head against the floor, in this, that before said accident she was at times subject to fainting spells or epilepsy, but that since her said injuries said fainting spells or epileptic fits are of much more frequent occurrence than formerly and her suffering therefrom correspondingly increased, and that the frequent recurrence of such fainting spells or epileptic fits is the result of her said injuries and her being thrown upon her head upon the floor of said car.

72 That as a result of said injuries *as* the physical pain as well as mental suffering, pain and anguish suffered by her, and on account of the permanent injury to her health by causing the more frequent recurrence of said fainting spells or epileptic fits, plaintiff is entitled to recover of defendant for the benefit of the community estate of himself and wife damages in the sum of five thou-

sand dollars as actual damages for the physical pain and mental suffering and anguish suffered by her and for the permanent injury done to her health as aforesaid.

Plaintiff further says that each and all of the wrongs and injuries done to him as well as his wife were caused through the negligence and want of ordinary care and diligence upon the part of defendant and its servants and employés, in this:

First. When said car or coach was left standing upon the track defendant and its servants and employés, when the remainder of the train was — backing down to said car, the same was negligently and carelessly and without the exercise of ordinary care done, and by reason thereof said car and train failed to couple together, either by reason of the careless and negligent manner in which said coupling was attempted to be made or on account of defendant's and its servants' negligence and carelessness in not having the coupling apparatus on said cars properly prepared and adjusted so as to couple together when coming in contact or for both of said reasons said coupling was not effected but instead thereof said car was pushed and run off down the track.

Second. Plaintiff says that before said train backed down to said car for the purpose of coupling thereto defendant and its servants and employés in charge of said train negligently, carelessly and without the use of ordinary care and diligence failed to properly prepare and adjust the couplings to said cars so that when they come together the couplings would catch and hold, that if said couplings had been properly set, prepared and adjusted then said cars would have, if properly brought together, coupled and the accident
73 averted.

Third. That defendant and its servants and employés when said car was left standing upon the track negligently, carelessly and without the exercise of ordinary care and diligence failed to provide and have said car equipped with proper and necessary appliances to prevent said car from moving and to set and leave set the brakes or apparatus for preventing said car from moving, that if said car had been properly provided, and equipped with and said brakes or apparatus had been properly attended to, then, although when the other part of the train backed down and against said car and failed to effect a coupling, nevertheless said car could not and would not run off in the way it did, but would have moved only a short distance and stopped.

Fourth. That at the time said car started off down the track the servants and employés that were on said car, and plaintiff says that there were servants and employés of defendant aboard of said car, through ignorance, unskillfulness, fright or some other unjustifiable cause, were unable to control said car and to stop the same, and failed, for the reason either that they did not know how or the appliances for stopping said car were out of order, to stop said car, wherefore defendant is guilty of negligence and want of ordinary care and diligence in the selection of its servants and employés placed in charge of said car or who were upon the same when it ran off. And if in fact said servants and employés were skillful and

no want of ordinary care or negligence can be imputed to defendant in their selection and employment, then defendant was nevertheless guilty of negligence and want of ordinary care and prudence in that the appliances with which said car was equipped and provided for stopping and holding same were inferior, insufficient and unsafe, or in such defective condition as not to be available for the purpose for which they were intended, and that they were inferior,
insufficient and unsafe and in such defective condition was
74 known or by the use of ordinary care and diligence could
have been known to defendant. And if said servants were skillful and efficient and the brakes and appliances for stopping said car were not inferior, insufficient, unsafe nor in a defective condition then defendant's servants were negligent and careless in failing to stop said car.

Fifth. Plaintiff says that when that part of the train backed down to couple to said car and failed to make such coupling and the servant sand employés of defendant instead of then following said car with said part of said train and coupling onto and stopping said car negligently and carelessly and without exercising the ordinary care and diligence that the occasion demanded permitted said car to run off and get a considerable distance away before starting after it, when, if when the first attempt and failure to couple thereto was made said part of the train with the locomotive attached had followed up said car the same by the use of proper and ordinary care and diligence could if the coupling appliances were of proper kind and in proper condition have been coupled onto and stopped or at least gotten under control in some way and the accident that resulted in the serious and great injuries done to plaintiff and his wife, as aforestated, been averted and avoided.

Sixth. That when said car was a considerable distance off and going at an increasing rate of speed defendant's servants and employés in charge of and operating the other part of the train started out to catch said car, or judging from the result of the race, to run said car down, and said servants and employés negligently and carelessly and without exercising ordinary care and diligence failed to watch and observe the speed of the runaway or wild car and so regulate the speed of the chasing train as to approach said wild car gradually and without doing damage thereto or to the passengers
upon said car and upon said chasing train, but negligently
75 and carelessly rushed down upon said car at a great rate of
speed and consequently crashed into same as hereinbefore set out, and thereby caused the injuries hereinbefore alleged.

Seventh. That defendant was guilty of culpable negligence and want of ordinary care in selecting and employing its servants and employés who were inefficient, incompetent and unskilled in the management in and handling trains of cars and, in this instance, acted in a most inefficient, incompetent and unskilled manner, and the accident which resulted in the injuries which are herein complained of was the result of the inefficiency, incompetency and unskillfulness of said servants and employés handling and operating said train of cars. That such inefficiency and unskillfulness of said

servants and employés is shown in the fact that said car was left on the track which was at that point on a steep incline, without having the brakes so set as to prevent its running away, in the inability and failure to stop said car after it had been started, in the failure to have the couplings so prepared and adjusted as to effect a coupling when the first attempt to couple thereto was made and when they failed to couple, and in running the other part of the train down upon said car without so regulating the speed of the chasing part of the train as to approach said car and catch the same without crashing into it, and in divers other ways as shown by the allegations of negligence hereinbefore set out was the inefficiency, incompetency and unskillfulness of said servants and employés shown and that they were inefficient, incompetent and unskillful was well known to defendant or by the exercise of reasonable care and diligence could have been known to defendant.

Plaintiff says that defendant was negligent in the discharge of its obligations and duties as a common carrier to plaintiff and his wife as passengers upon its said passenger train under each and
76 all of the foregoing seven counts charging negligence and that the said injuries of himself and wife were the result of such negligence and if upon trial hereof it be found that defendant is chargeable with negligence in either or all of said counts then plaintiff should recover against defendant actual damages in the sum of twelve thousand dollars for injuries by him sustained and for loss of time, and for the benefit of the community estate of himself and wife the sum of five thousand dollars actual damages on account of the injuries done to her.

Plaintiff says that the said injuries to himself and wife accrued through no fault or negligence upon the part of himself and wife, or either of them, that contributed thereto, but were the result of the negligence and want of ordinary care and diligence upon the part of the defendant, its servants and employés.

That said injuries to plaintiff are of a permanent character, that is to say plaintiff's right leg, foot and ankle have been permanently injured, his left foot, ankle and leg permanently disabled and that as a result of his injuries he has become attacked and afflicted with rheumatism and thereby also permanently disabled, that he will continue, even if he secures temporary relief, to be subject to attacks of rheumatism and rheumatic pains much to his annoyance, inconvenience and physical pain and suffering and mental anguish as well as menacing to his life.

That plaintiff has expended large sums in payment for physicians and medical attendance and for medicines for himself and wife since their said injuries and on account of said injuries, and will be compelled to expend further sums for medicine and physicians' services; that to obtain relief from the rheumatism resulting from the injuries received by him, he, at a great expense, has visited and tried the curative powers of the hot springs at Santa Rosalia, Mexico, but has received but little if any relief therefrom. Wherefore on account of

said expenditures to say doctors' bills, medicines and expenses
77 to said hot springs and return and the expenses incident thereto, such as extra costs of living at hotels and away from home, he has incurred an expense of one thousand dollars.

Plaintiff says that at the time of filing his original petition herein rheumatism had not, to his knowledge, then developed and attacked him, nor had he then incurred any expenses for physicians or medicines. Wherefore he prays now for one thousand dollars actual damages in addition to the damages claimed in said original petition, and that upon hearing hereof he recover of defendant damages in the total sum of eighteen thousand dollars, and for costs of court and all such other relief general and special as plaintiff may in the premises be entitled to. As in duty bound will ever pray.

(Signed) THURMOND & RUSSELL,
Attorneys for Plaintiff.

That plaintiff's original petition as to all jurisdictional averments is as follows:

THE UNITED STATES OF AMERICA:

To the hon. circuit court for the western district of the State of Texas, at its October term, 1901, held at El Paso, Texas:

THE STATE OF TEXAS,
County of El Paso,
Western District of the State of Texas.

To the Hon. T. S. Maxey, judge of said court:

Your petitioner, J. M. Duthie, who is hereinafter styled plaintiff, complaining of The Mexican Central Railway Compaay, Limited, and which company is hereinafter styled defendant, respectfully represents:

That plaintiff resides in El Paso, in El Paso county, State
78 of Texas, in the western district of said State. That defendant is a railway or railroad corporation duly incorporated and chartered under the laws of and is a citizen of the State of Massachusetts, in said United States of America, and owns and operates a line of railroad from El Paso to the city of Mexico in the Republic of Mexico, and is now, was on the 22nd day of July, 1901, and for many years prior thereto engaged in and pursuing the business of hauling and carrying by rail, for hire, passengers and freight over its said line to and fro between the cities above named.

That defendant has and maintains in the city of El Paso an office or offices for the transaction of its general business as common carriers of passengers and freight and has and employs there its local agent, whose name is S. R. Comfort.

That plaintiff is a married man of family consisting of himself, his wife Francis A. Duthie, and their minor son.

That this cause was tried on defendant's original answer, as follows, to wit:

In the U. S. Cir. Court, April Term, 1902.

"J. M. DUTHIE
vs.
M. C. R'Y COMPANY, LIMITED. } No. 297.

Now comes the defendant in the above styled and numbered cause and excepting to plaintiff's petition filed herein says: that same is insufficient in law and fails to state cause of action, and of this the defendant prays judgment of the court.

And for further answer in this behalf defendant comes and says that it denies all and singular the allegations of plaintiff's said petition and of this it puts itself upon the country."

That said cause coming on to be heard defendant read its general demurrer to plaintiff's said petition, and presented the same
79 without argument requesting the court to rule upon same. The court then and there overruled said demurrer as shown by the following order:

"J. M. DUTHIE
vs.
THE MEX. CENTRAL R'Y CO., LIM. } No. 297.

In this cause this 9th day of April, came on to be heard the general demurrer and exception of defendant to plaintiff's amended petition and the same being heard by, and duly submitted to, the court, it is hereby overruled, to which ruling of the court defendant duly excepted."

That after said demurrer was overruled, each party announced ready for trial, and the pleadings being read, the evidence was offered in behalf of both parties. No evidence having been adduced by either party as to plaintiff's or defendant's residence, domicile, habitation or citizenship.

That upon the pleadings and proof in the cause the court instructed the jury to find a verdict for the plaintiff for such damages as plaintiff had sustained; that the jury on the 10th day of April, 1902, returned into open court the following verdict, to wit:

"J. M. DUTHIE
vs.
MEXICAN CENTRAL RAILWAY CO., L'T'D. } No. 297.

We the jury find for the plaintiff and assess his damages at $8,500 (eighty-five hundred dollars), of which sum we find $7,500 seventy-five hundred dollars for injuries to himself, and $1,000 one thousand dollars for injuries to his wife, Frances A. Duthie.

T. J. CASSIDY, *Foreman.*"

80 That on said 10th day of April, 1902, judgment was entered upon said verdict as follows:

"J. M. DUTHIE
vs.
THE MEXICAN CENTRAL R'Y CO., LIM. } No. 297.

This cause being called this 9th day of April, 1902, for trial, came the parties, plaintiff in person and by his attorneys and defendant by its attorneys, and respectively announced themselves ready for trial, whereupon came a jury of twelve good and lawful, duly qualified jurors, to wit: T. J. Cassidy and eleven others, who were duly and legally tried, impaneled and sworn to try said cause, and who after hearing the pleadings of the respective parties read, and having heard the evidence adduced, and on the following day, to say, this April 10th, 1902, received the charge of the court, retired to consider of their verdict and thereafter returned on the same day into open court their verdict as follows:

'J. M. DUTHIE
vs.
MEXICAN CENTRAL R'Y CO., L'T'D. } No. 297.

We the jury find for the plaintiff and assess his damages at $8,500 (eighty-five hundred dollars), of which sum we find $7,500 seventy-five hundred dollars for injuries to himself and $1,000 one thousand dollars for injuries to his wife Frances A. Duthie.

T. J. CASSIDY, *Foreman.*'

And which said verdict was by the court approved, and the jury discharged, wherefore, in accordance with the verdict of the jury, it is ordered, adjudged, and decreed by the court that the plaintiff J. M. Duthie do have and recover of and from the defendant
81 The Mexican Central Railway Company, Limited, the sum of eight thousand five hundred dollars as found by the jury, together with all costs in this case incurred, for all of which let plaintiff have his execution. It is further ordered that the officers of this court have and recover of the respective parties herein the cost by them respectively incurred."

That no further proceedings were had in said cause after the entry of said judgment until, to wit: the 17th day of April, 1902, on which day plaintiff filed his motion asking leave to amend his petition, which motion is as follows:

" In the Circuit Court of the United States of America for the Western District of the State of Texas, Sitting at El Paso, Texas.

J. M. DUTHIE
vs.
MEXICAN CENTRAL R'Y CO., LIM'T. } No. 297.

In this cause now comes the plaintiff J. M. Duthie and shows to this honorable court that in alleging the necessary jurisdictional facts in his original and first amended original petitions filed herein on the 29th day of August, 1901, and on the 19th day of March, 1902,

respectively, plaintiff omitted and failed to allege that he, plaintiff, was a citizen of the State of Texas and of the United States of America. Wherefore he now comes and prays the court that leave be granted him to now amend his said original and first amended petition by inserting therein the following: 'and is a citizen of said State and of the United States of America,' after the allegation made in said pleading 'That plaintiff resides in El Paso, in El Paso county, State of Texas,' and in support of this motion plaintiff upon oath says
82 that he is now and was at the date of filing his original petition herein and was on the 22nd day of July, 1901, the date of his injuries, a *bona fide* citizen of the United States of America and of the State of Texas.

JOHN M. DUTHIE.

Subscribed and sworn to before me this 17th day of April, 1902.
[SEAL.] SEYMOUR THURMOND,
Notary Public, El Paso Co., Texas."

That said motion coming on to be heard on said 17th day of April, 1902, the court in said cause made the following order, to wit:

"J. M. DUTHIE
vs.
THE MEXICAN CENTRAL R'Y CO., LIM. } No. 297.

In this cause this 17th day of April, 1902, came on to be heard the motion of plaintiff praying leave to amend his original petition and first amended original petition, filed herein, August 29th, 1901, and on the 19th day of March, 1902, respectively, so as to supply the allegation that plaintiff was at the date of institution of this suit a citizen of the State of Texas and of the United States of America, and the court having heard said motion, and the argument of counsel by the respective parties, each of said parties being represented by counsel present in court, and fully considered the same, is of opinion that the prayer of the motion should be granted. Wherefore it is ordered by the court that plaintiff have leave to now amend his original petition filed herein on the 29th day of August, 1901, and his first amended original petition filed herein on the 19th day of March, 1902, by inserting in said original petition and amended original petition, on the first page of said original
83 and amended petitions, after the words and sentence, 'That plaintiff resides in El Paso, in El Paso county, State of Texas, in the western district of said State,' and before the sentence beginning 'That defendant is a railway or railroad corporation,' etc., and allegations in the language and words following, to say: 'and is a citizen of said State and of the United States of America,' and thereupon the plaintiff in open court on this 17th day of April, 1902, made and inserted in said original and first amended petitions the words: 'and is a citizen of said State and of the United States of America.' To which order of the court granting leave to plaintiff to make the amendment aforesaid and to the making of such

amendment by interlining same in the pleadings without rewriting the pleading so amended defendant through its counsel then and there in open court excepted."

That to said order permitting said amendment defendant then and there in open court excepted, and the court permitted plaintiff, without filing an amendment in said cause, and without setting aside the judgment heretofore rendered, to insert in his original petition and his amended petition hereinabove set out, in paragraph three thereof, the words: "and is a citizen of said State and of the United States of America," after that part of said paragraph reading as follows: "That plaintiff resides in El Paso, El Paso county, State of Texas, in the western district of said State," and defendant excepted to the action of the court in permitting the plaintiff to insert the said words in his original and amended petition without requiring the plaintiff to file a new amendment, saving bills of exceptions upon both of said points.

At defendant's request, the questions arising upon the overruling of defendant's general demurrer, and upon defendant's exception to the action of the court in not dismissing this cause and in
84 permitting plaintiff to amend his complaint and pleadings and to insert jurisdictional averments therein, and as to whether or not this court has jurisdiction in this cause, and power to permit said amendment after verdict and final judgment has been entered upon said verdict, without setting aside said judgment and resubmitting the case, and whether or not the court has jurisdiction so as to render said judgment valid from the date of the amendment made as aforesaid is hereby certified. The jurisdiction of this court in the matters aforesaid being hereby certified to the United States Supreme Court pursuant to the authority of section 5 of the act of March 3rd, 1891, entitled: "An act to establish circuit courts of appeal, and to define and regulate, in certain cases, the jurisdiction of the courts of the United States and for other purposes," that is to say:

First. Whether or not the court should have dismissed this cause for want of jurisdiction upon becoming aware that the record did not contain the necessary jurisdictional matters.

Second. Whether the judgment rendered in this cause is validated and made effective by reason of the amendment made by plaintiff as aforesaid.

Third. Whether the court had jurisdiction, after verdict and after judgment entered upon said verdict, to permit, without setting aside this judgment and verdict, the plaintiff to amend his petitions, both original and amended, by inserting the necessary jurisdictional averments therein.

See Maddox v. Thorn, 60 F. R. 217.
Tremain v. Hitchcock, 90 U. S. 97.

Fourth. Whether or not the court should have set aside the verdict and judgment rendered herein and dismissed this case for want of jurisdiction on its own motion.

Signed and certified o, this 18th day of April, A. D. 1902, during the present term of this court, the same being still in session for the term at which said cause was tried.

T. S. MAXEY, *Judge.*

85 (Endorsed:) No. 297. In U. S. circuit ct. J. M. Duthie *vs.* M. C. R'y Co., Lim. Certificate of jurisdictional questions arising in this cause. Filed Ap'l 18th, 1902. D. H. Hart, clerk. By J. P. Hodgson, deputy.

Defendant's Assignment of Errors.

Filed April 18, 1902.

In the United States Circuit Court in and for the Western District of Texas, Sitting at El Paso, Texas, April Term, A. D. 1902.

J. M. DUTHIE
vs.
MEXICAN CENTRAL R'Y CO., LIM. } No. 297.

Now comes the defendant, The Mexican Central Railway Company, Limited, by its counsel, and says that in the record and proceedings of the above styled and numbered cause there is manifest error, to wit:

1st. The court erred in overruling defendant's demurrer to plaintiff's petition for the reason that the averments thereof were not sufficient to show that the court had jurisdiction therein.

2nd. That the court had no jurisdiction in this cause and should have dismissed the same upon its own motion.

3rd. That the court should not have permitted plaintiff to destroy or alter the record by interlining in the pleadings certain jurisdictional averments and the trial court had no jurisdiction to permit plaintiff to amend his original petition and first amended original petition, by inserting the necessary jurisdictional averments therein, without first setting aside the verdict and judgment herein, and granted a new trial.

4th. It being nowhere averred and proved by plaintiff
86 that he was a citizen of the United States of America or of the State of Texas, prior to the rendition of said judgment, the court was without jurisdiction herein and should have set aside said verdict and judgment for the reason that it had no jurisdiction at the time of its rendition.

Wherefore, the defendant, The Mexican Central Railway Company, Limited, prays that the judgment rendered against defendant by the United States circuit court for the western district of Texas, be reversed and that this cause be dismissed for want of jurisdiction.

FALVEY & DAVIS,
Attorneys for Defendant.

(Endorsed:) J. M. Duthie *vs.* Mexican Central R'y Co., Lim. Defendant's assignment of errors. Filed Ap'l 18th, 1902. D. H. Hart, clerk. By J. P. Hodgson, deputy.

Defendant's Petition for Writ of Error.

Filed April 28, 1902.

J. M. DUTHIE
vs.
MEXICAN CENTRAL RAILWAY CO., LIM. } No. 297.

UNITED STATES OF AMERICA,
Western District of Texas.

To the honorable justices of the Supreme Court of the United States:

The petition of the Mexican Central Railway Company, Limited, shows that in the record and proceedings, and also in the rendition of a judgment of a plea in the circuit court of the United States
87 for the western district of Texas, in a certain cause therein pending between J. M. Duthie, plaintiff, and The Mexican Central Railway Company, Limited, defendant, number 297, filed in said court at the October term thereof, A. D. 1901, in which judgment was rendered against defendant on the 10th day of April, 1902, manifest error hath intervened to the great prejudice and damage of the defendant.

Wherefore, defendant prays for the allowance of a writ of error, and such other processes as may cause the same to be corrected by the Supreme Court of the United States to be held in the city of Washington, District of Columbia.

FALVEY & DAVIS,
Attorneys for Petitioner, Mexican Central Railway Company, Limited.

Granted this 30 day of April, A. D. 1902.

T. S. MAXEY, *Judge.*

(Endorsed:) No. 297. In the United States circuit court for the western district of Texas, at El Paso. J. M. Duthie *vs.* Mexican Central Railway Co., Lim. Defendant's petition for writ of error. Filed this 28th day of Ap'l, 1902. D. H. Hart, clerk. J. P. Hodgson, deputy.

88 *Writ of Error.*

J. M. DUTHIE
vs.
MEXICAN CENTRAL RAILWAY COMPANY, LIM. } No. 297.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable judges of the circuit court of the United States for the western district of Texas, Greeting:

Because in the record and proceedings, and also in the rendition of a judgment of a plea, which is in said circuit court before you

or some of you, between J. M. Duthie, plaintiff, and The Mexican Central Railway Company, Limited, defendant, manifest error hath happened to the great damage of said Mexican Central Railway Company, Limited, as by its complaint appears, we, being willing that error, if any hath been, shall be duly corrected and full and speedy justice done to the parties aforesaid, in this behalf, do command you, if judgment be therein given that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, to be holden at Washington, District of Columbia, in not exceeding thirty days from the — day of ——, A. D. 1902, the next term of said court to be held on the second Monday in October next, in the Supreme Court of the United States, to be then and there held, and the record and proceedings being inspected, the Supreme Court of the United States may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 28th day of April in the year of our Lord, 1902.

{ The Seal of the U. S. Circuit Court, Western Dist. Texas, El Paso. }

D. H. HART, *Clerk*,
88½ By J. P. HODGSON, *D'y Clerk.*

Allowed 30 day of April, A. D., 1902.

T. S. MAXEY, *Judge.*

[Endorsed:] No. 297. In the United States circuit court, in and for the western district of Texas. J. M. Duthie *vs.* Mexican Central Railway Company, Limited. Writ of error. Filed this 28th day of Ap'l 1902. D. H. Hart, clerk, by J. P. Hodgson deputy.

89 *Citation in Error.*

THE UNITED STATES OF AMERICA, }
Fifth Judicial Circuit. }

The President of the United States to J. M. Duthie, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States, at Washington, District of Columbia, within thirty days from the date of the service hereof, pursuant to writ of error sued out and filed in the clerk's office of the circuit court of the United States for the western district of Texas, in the cause wherein Mexican Central Railway Company, Limited, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in this behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this 28th day of April, in the year of our Lord, 1902.

Signed this 30 day of April, A. D., 1902.

T. S. MAXEY,
United States Judge.

{ The Seal of the U. S. Circuit Court, Western Dist. Texas, El Paso. }

Attest: D. H. HART, *Clerk*,
By J. P. HODGSON, *D'y.*

We hereby acknowledge service of the above and foregoing citation in error.

—— ——.

Received this writ on this the 8th day of May A. D. 1902 and executed on the 8th day of May A. D. 1902 by delivering a true copy of this writ in person at El Paso Texas in my district to S. N. Russell a member of the law firm Thurmond and Russell.

GEO. L. SIEBRECHT,
U. S. Marshal, W. D. of T.,
By H. R. HILLEBRAND, *Deputy.*

[Endorsed:] No. 297. Mexican Central Railway Company, Limited, plaintiff in error, *vs.* J. M. Duthie, defendant in error. Citation. Filed this 28th day of Ap'l 1902. D. H. Hart, clerk, by J. P. Hodgson deputy.

90 *Clerk's Certificate.*

THE UNITED STATES OF AMERICA, }
Western District of Texas. }

I, D. H. Hart, clerk of the United States circuit court for the western district of Texas, do hereby certify that the foregoing 87 pages contain true and correct copies of all proceedings had in cause No. 297 on the docket of said court at El Paso, Texas, entitled J. M. Duthie *vs.* Mexican Central Railway Company, Limited, as the same appear of record and on file in this office. And I further certify that the original writ of error and the original citation in error are attached therewith, paged respectively 88 and 89.

Witness my hand and the seal of said circuit court at office in the city of El Paso, Texas, this 20th day of May, A. D. 1902.

{ The Seal of the U. S. Circuit Court, Western Dist. Texas, Austin. }

D. H. HART, *Clerk.*

Endorsed on cover: File No. 18,545. W. Texas C. C. U. S. Term No. 336. Mexican Central Railway Company (Limited), plaintiff in error, *vs.* J. M. Duthie. Filed May 27", 1902.